INTENTIONAL ACTS AND THE DEFINITION OF DISQUALIFYING MISCONDUCT IN LOUISIANA UNEMPLOYMENT LAW

Charlie Penrod, J.D.*

I. INTRODUCTION .................................................................................................782

II. BACKGROUND: THE UNEMPLOYMENT INSURANCE SYSTEM .................................................................784

A. History ..............................................................................................................784
B. The Boynton Cab Standard .............................................................................787
C. The Louisiana Statutory Definition ................................................................790

III. ANALYSIS: INTENTIONAL VERSUS NEGLIGENT..................................................791

A. Delta American v. Burgess ..............................................................................792
B. Other Second Circuit Decisions .....................................................................794
C. Third, Fourth, and Fifth Circuit Jurisprudence .............................................796
D. A Better Approach: Louisiana’s UI Scheme Should Not Require an Intentional Act .................................................................798
   1. It is Presumed the Statute Has Changed ......................................................799
   2. Negligence Versus Intentionality ..................................................................801

E. Other States’ Approaches ................................................................................803
F. The Supreme Court’s View ............................................................................804
G. The First Circuit’s Decisions .........................................................................805

H. Analyzing Prior Cases Using the New Interpretation .....................................806
   1. Taco Bell v. Perkins ..........................................................................................807
   2. Delta American v. Burgess .............................................................................808
   3. Harsco Corp. v. Victoria .................................................................................808
   4. Dyer v. NurseCall Nursing ............................................................................809

IV. CONCLUSION: A CALL FOR SUPREME COURT REVIEW ........................................811

* Assistant Professor, Legal Studies Program, University of West Florida.

781
I. INTRODUCTION

People lose their jobs for a variety of reasons. Some quit, some are laid off, and some are fired. Sometimes it is the worker's fault, and sometimes it is not. Unemployment, regardless of how temporary, can be a frightening and life-altering period in a person's life. Fortunately, the government allows workers to collect unemployment benefits to stave off financial calamity during the next job search. It is in society's best interest to ensure that those who lose their jobs without immediately gaining new employment have a financial safety net to avoid poverty loss, mounting debt, or even bankruptcy. Those who lose their jobs for reasons beyond their control are sympathetic victims, and the unemployment insurance system exists to provide a bridge of financial support until those workers find new employment.¹

Indeed, workers who are laid off are the easy cases. Workers who perform their jobs admirably, but are the unfortunate byproduct of employer cost-cutting measures, deserve assistance to avoid irreversible financial consequences. Unemployment insurance is designed to give workers adequate time to find new employment to lessen the likelihood of financial catastrophe.²

Workers who quit their jobs are another story. For "quitters," the responsibility for future economic hardship lies with the worker. The worker made a voluntary choice to end his or her employment, resulting in the inability to earn income, pay creditors, and provide for the necessities of life. For this reason, the unemployment insurance system generally does not support those that voluntarily end their employment without good cause connected with their employment.³

Neither of these previously mentioned categories of workers warrant much discussion. The gray area of unemployment insurance, and one that has been heavily litigated, revolves around what to do with those workers who are fired. While those who innocently lose their jobs deserve unemployment benefits, the government should not have to pay for unemployment when it is directly caused by the employee's misconduct. Similar to those who quit, those who engage in some sort of deviant misconduct

---

1. See discussion infra Part II.A.
2. See discussion infra Part II.A.
should be responsible for their own fates. However, it is a simple reality of the workplace that workers make mistakes, and relatively minor or accidental conduct should not lead to financial instability. Whereas the person who quits his job may have irresponsibly or even recklessly decided to end his revenue stream, a worker who tries hard but simply cannot do the job has not behaved irrationally. There are, of course, other reasons people are fired from their jobs. Employees who intentionally refuse to do the job, purposely cause damage to the employer’s property, or refuse to show up to work when scheduled are not innocent victims when the employer chooses to end the employment relationship.

Title 23, § 1601 of the Louisiana Revised Statutes recognizes these categories by specifically excluding employees terminated for misconduct from the receipt of employment benefits. Misconduct, however, is not an easy concept to define. It is debatable whether misconduct requires some degree of intentional culpability or some level of negligence that directly impairs or threatens the employer’s ability to adequately conduct business. Prior to 1990, the term “misconduct” had no statutory definition in Louisiana, but the Louisiana Supreme Court made it clear that intentional conduct was the minimum threshold to deny a terminated worker unemployment benefits. The legislature subsequently amended the statute to expressly define misconduct; however, four of the five Louisiana circuits that have interpreted misconduct in § 1601 noted that the amendment did not modify the preamendment jurisprudence.

This Article explores the impact that the legislature’s amendment to the statute should have made on the definition of misconduct and calls for supreme court review to ultimately resolve the existing circuit split. Specifically, this Article argues that the legislature intended to broaden the scope of misconduct

---

4. Louisiana is an employment-at-will state, meaning that employers can fire employees for any reason, or no reason at all, provided that the basis for the decision does not include a protected characteristic covered by federal or state law, such as race, gender, disability, and age. Ledet v. Campo, 12-1193, p.8 n.5 (La. App. 3 Cir. 3/6/13); 128 So. 3d 1034, 1040 n.5; Quebedeaux v. Dow Chem. Co., 2001-2297, p. 5 (La. 6/21/02); 820 So. 2d 542, 545-46.
8. See discussion infra Part III.C; see also infra note 42 and accompanying text.
to include some actions that are merely negligent and not intentional. Notably, this Article leaves it to social scientists to decide whether the change to the definition of misconduct is a good idea.\textsuperscript{9} Instead, this Article points to simple and well-known maxims of statutory construction to illustrate the inconsistency of the view of the majority of Louisiana appellate courts on misconduct.

Part II of this Article provides background on the unemployment insurance systems in Louisiana and across the nation and explains the state of the jurisprudence pre-amendment and post-amendment. Part III contends that Louisiana courts should broaden their definition of misconduct to comport with the statutory definition and illustrates how decided cases may have been resolved differently had courts applied the correct standard. Part IV concludes with a call for supreme court action that gives teeth to the statutory definition of misconduct.

\textbf{II. BACKGROUND: THE UNEMPLOYMENT INSURANCE SYSTEM}

\textbf{A. HISTORY}

The unemployment insurance (UI) system is a nationwide scheme to furnish financial assistance to those who are unemployed. Congress created the UI system in the 1930s as a way to stifle the rampant unemployment of the Great Depression.\textsuperscript{10} Louisiana's UI system is a partnership between the federal government and the state.\textsuperscript{11} The State of Louisiana

\textsuperscript{9} For example, Lisa Graditor argues that current unemployment schemes place a disproportionate emphasis on the employee, which she calls "bad economics," given that employees have no reason to cause their own unemployment for the sole purpose of receiving an unemployment check. Lisa Lawler Graditor, \textit{Back to Basics: A Call to Re-Evaluate the Unemployment Insurance Disqualification for Misconduct}, 37 J. MARSHALL L. REV. 27, 58 (2003). On the other hand, Marisa Zizzi argues that it is "paramount" to forbid employees from breaking employer work rules due to the fear that workers will no longer feel the need to comply with the employer's reasonable work rules. Marisa G. Zizzi, Maskerines v. Unemployment Compensation Board of Review: Clarifying the Burden on an Employer under Section 402(e) of the Pennsylvania Unemployment Compensation Law, 21 WIDENER L.J. 573, 587 (2012).

\textsuperscript{10} Graditor, supra note 9, at 28. Graditor makes the further point that, by and large, the UI system is relatively intact from its beginnings in the 1930s, in terms of the mission, scope and procedures used to implement the system. \textit{See id.} However, as will be seen further in this Article, one trend that is appearing in several states is the lessening of the employer's burden for proving employee misconduct.

\textsuperscript{11} RICK J. NORMAN, LOUISIANA PRACTICE SERIES: EMPLOYMENT LAW § 13:1
runs and implements the UI program, after receiving and maintaining approval from the U.S. Department of Labor. The UI system is not designed to incentivize or punish certain employer or employee behavior; rather, the system is merely in place to protect families against sudden and potentially catastrophic reductions in income. However, employer-paid unemployment taxes pay for and fund the system. Essentially, the more former employees of an employer that apply for and receive unemployment benefits, the higher the tax rate that employer will have to pay into the system. States collect these taxes only from employers and use the revenue to fund the federal government's administration of trust funds within the UI system.

A core concept of many UI state systems entitles workers to UI benefits only when the former employee's fault did not cause the unemployment. Louisiana's statement of public policy justifying UI, however, makes no mention of the fault of the employee. Instead, it references the "menace" of economic


13. Id.; see also Holmes v. State, Dep't of Emp't Sec., 353 So. 2d 737, 739 (La. Ct. App. 1977) (holding that the purpose of unemployment compensation is relieving the "family distress and the menace to the public welfare occasioned through unemployment of the individual worker").


15. Jyles, supra note 14, at 363. As Jyles points out, it is not exactly accurate to describe the UI system as one that does not seek to punish the employer. See id. Since the unemployment tax rate of the employer is a direct function of the number of employees receiving UI benefits, employers are incentivized to keep employees that it might otherwise terminate if the cost of the increased UI tax is more than the cost of keeping a sub-quality worker. See id. In other words, employers must, consciously or not, determine if the added benefits of a better, more competent worker outweigh the cost of its increased tax load for its former employee.

16. Graditor, supra note 9, at 35.

17. E.g., WASH. REV. CODE ANN. § 50.01.010 (West 2012). Marisa Zizzi describes Pennsylvania's "no fault" system as one that disqualifies an employee from benefits where the employee violates an employer's work rule. Zizzi, supra note 9, at 573. In such a case, Zizzi argues that "public policy considerations" demand that former employees should not receive an undeserved windfall when the true reason for discharge is because the employee failed to reasonably act within the employer's expectations. Id.

18. LA. REV. STAT. ANN. § 23:1471 (2011). However, older jurisprudence has mentioned that unemployment benefits should only be denied when the termination is through no fault of the employee. Abadie v. Bayou Steel Corp., 94-322, p.5 (La.
insecurity through unemployment.\textsuperscript{19} Perhaps slightly hyperbolically, the statute calls unemployment the "greatest hazard of our economic life," which can be adequately addressed by encouraging employers to provide for "more stable employment" and by setting aside unemployment reserves for those who become unemployed.\textsuperscript{20} Some Louisiana courts interpret this statement of public policy as requiring construction of Louisiana law in favor of awarding benefits, unless an exemption specifically applies to the situation.\textsuperscript{21}

Louisiana, like many other states,\textsuperscript{22} divides the world of unemployment into two major categories, each with differing standards for disqualification.\textsuperscript{23} The first category encompasses situations in which the employee quits his or her job.\textsuperscript{24} In most circumstances, an employee is ineligible for unemployment benefits when he or she voluntarily quits.\textsuperscript{25} In other words, the baseline consequence for voluntarily leaving one's job is disqualification from unemployment benefits, under the theory that the unemployment is the direct result of the employee's refusal of available work. The exception to this rule is if the employee quits with good cause "attributable to a substantial

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{19} LA. REV. STAT. ANN. § 23:1471 (2011).
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Charbonnet v. Gerace, 457 So. 2d 676, 678 (La. 1984).
\item \textsuperscript{22} Examples of these states include Arizona, Minnesota, and Virginia. \textit{See}, e.g., ARIZ. REV. STAT. ANN. § 23-775(1), (2) (2012) (stating that those that leave work "without good cause in connection with the employment," or those that are discharged for "misconduct," are disqualified); MINN. STAT. ANN. § 268.095 subdivs. 1, 4 (West 2007 & Supp. 2013) (categorizing the major unemployment groups as "quit" and "discharge"); VA. CODE ANN. § 60.2-618(1), (2) (2014) (stating that unemployment for leaving work voluntarily without good cause and misconduct are the two major categories).
\item \textsuperscript{23} \textit{See} Graditor, \textit{supra} note 9, at 30-31 ("The two predominant disqualifications are for workers who commit 'misconduct' at work and workers who 'voluntarily terminate' or quit their employment." (citing 820 ILL. COMP. STAT. ANN. 405/601, 405/602 (West 2011))). There certainly are other "minor" categories of disqualification, such as participation in labor disputes, LA. REV. STAT. ANN. § 23:1601(4) (2011 & Supp. 2014), or receipt of benefits from another state's UI coverage. \textit{Id.} § 23:1601(5). While these categories exist, this paper focuses on the two more common reasons for unemployment—quitting or discharge. Graditor notes that many states offer other specific qualifications not seen in Louisiana law, such as those persons that quit because of domestic violence or due to compelling family circumstances. Graditor, \textit{supra} note 9, at 31.
\item \textsuperscript{24} LA. REV. STAT. ANN. § 23:1601(1)(a) (2011 & Supp. 2014).
\item \textsuperscript{25} Id.
\end{enumerate}
\end{footnotesize}
change made to the employment by the employer."

But in many instances, an employee quits for reasons that have nothing to do with changes in the conditions of employment. For this narrow exception to apply, there should be some affirmative action by the employer that makes it difficult for the worker to continue employment.

The more difficult area of unemployment law comes up with discharged employees. Contrary to employees who quit, the default rule for discharged workers is that these workers generally qualify for benefits, since the employer, and not the employee, causes the unemployment. A common exception to this rule found nationwide is when the employee is discharged for "misconduct" connected with his employment. Louisiana's statute prohibits an employee from receiving unemployment benefits when the employee's own actions compelled the employer to discharge him. Essentially, the employee qualifies as "at fault" if significant misconduct by the employee led to the termination.

**B. THE BOYNTON CAB STANDARD**

What constitutes misconduct is a matter of interpretation, and state statutes on the matter widely diverge. The traditional definition of misconduct comes from a highly influential and early
Wisconsin Supreme Court case.\textsuperscript{31} In \textit{Boynton Cab Co. v. Neubeck},\textsuperscript{32} the Wisconsin Supreme Court defined misconduct to include three classes of conduct. They are: (1) "willful or wanton disregard of an employer's interests," (2) "deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee," and (3) "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests."\textsuperscript{33} On the other hand, \textit{Boynton Cab} stressed that "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertences or ordinary negligence in isolated instances, or good faith errors in judgment" are not to be labeled misconduct.\textsuperscript{34}

The important take-away from \textit{Boynton Cab} is a clear requirement that some sort of intentional conduct be present to disqualify an employee from UI benefits under the misconduct theory. All three options under \textit{Boynton Cab} require an intentional act. The first requires a "willful and wanton" act, which clearly precludes accidental or negligent behavior. The second option requires "deliberate" violations, which are synonymous with an intentional motivation. Lastly, although the third option does in fact use the word "negligence," the modifier clearly indicates that the negligence must be so manifestly wrongful or culpable that it is equivalent to an intentional disregard of the employer's interest. If the motivation is not

\textsuperscript{31} As noted by Patricia Wall and Alfred Smith, many states, including Tennessee, have adopted the \textit{Boynton Cab} rule to define misconduct for purposes of UI. Patricia S. Wall & Alfred M. Smith Jr., 'Boynton Cab' Revisited: What Ain't Misbehavin' for Unemployment Insurance Purposes?, TENN. B.J., Feb. 2010, at 12, 13.

\textsuperscript{32} Boynton Cab Co. v. Neubeck, 296 N.W. 636 (Wis. 1941).

\textsuperscript{33} \textit{Id.} at 640. Scholars have noted that Pennsylvania, Illinois, and Washington have all used this baseline definition in crafting rules for misconduct in their respective states. In Pennsylvania, the jurisprudence has, in the absence of a statutory definition, largely adopted the \textit{Boynton Cab} rule. \texttt{See Zizzi, supra} note 9, at 574-75. Graditor notes that Illinois bases its statutory definition of misconduct on the \textit{Boynton Cab} rule, with the notable exception that the Illinois rule eliminates any mention of negligence as a disqualifier for misconduct. \texttt{Graditor, supra} note 9, at 44. James Levy observes that one appellate court in Washington adopted the \textit{Boynton Cab} test almost verbatim, while others have adopted a slightly amended version of this leading rule. James Levy, \textit{In Willful Disregard of the Employment Security Act: Culpability and the Determination of Disqualifying Misconduct by the Courts}, 22 \texttt{SEATTLE U. L. REV. 617, 621-22 (1998)}.

\textsuperscript{34} \textit{Boynton Cab}, 296 N.W. at 640.
intentional, there can be no finding of culpability, wrongful intent, or evil design.\textsuperscript{35} It is clear that the \textit{Boynton Cab} standard is "the most generous to workers."\textsuperscript{36}

Many states, whether adopting \textit{Boynton Cab} explicitly or not, continue to maintain a strict requirement of an intentional act to prove disqualifying misconduct.\textsuperscript{37} A minority of states, however, have expanded \textit{Boynton Cab} to define misconduct to include acts that are below the intentional threshold. Those states have defined misconduct in ways that favor the employer and generally include some types of negligent actions as a bar to UI benefits.\textsuperscript{38} Whether Louisiana follows the former or latter approach will have a great impact on the ability of discharged employees to receive UI benefits.

\textsuperscript{35} Of course, culpability, wrongful intent, and evil design all imply an intentional state of mind, rather than one where a certain standard of care was not met.

\textsuperscript{36} Rebecca Smith et al., \textit{Unemployment Insurance and Domestic Violence: Learning from Our Experiences}, 1 \textit{Seattle J. For Soc. Just.} 503, 520 (2002).

\textsuperscript{37} See, e.g., TENN. CODE ANN. § 50-7-303(b)(3) (2014); Wall & Smith, \textit{supra} note 31, at 14 ("[U]nder the statute, the employee's conduct must be intentional . . . "); FLA. STAT. ANN. § 443.036(29) (West, Westlaw through Ch. 255 (End) of the 2014 2nd Reg. Sess. and Sp. "A" Sess. of the Twenty-Third Legislature ) (defining misconduct to include "deliberate violation[s]", "wrongful intent", and "willful and deliberate violation[s]""); John Sanchez, \textit{2004-05 Survey of Florida Employment Law}, 30 \textit{Nova L. Rev.} 123, 140-41 (2005) (noting that Florida courts require either "intentional" or "willful, wanton, or deliberate" actions to constitute misconduct); VA. CODE ANN. § 60.2-618(2)(b) (2014) (defining misconduct to include, among other things, providing "intentionally false or misleading" statements, "willful and deliberate violation[s] of a standard or regulation," and "deliberate violation of a known policy"); N.C. GEN. STAT. § 96-14.6(b) (2013) (defining misconduct as either "willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior" or "[c]onduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests"); ARK. CODE ANN. § 11-10-514(a)(3)(B)(i)-(ii) (2012 & Supp. 2013) (defining misconduct as "[d]isregard of an established bona fide written rule" or "[a] willful disregard of the employer's interest"); Smith v. Sampson, 816 P.2d 902, 904 (Alaska 1991) (jurisprudentially defining misconduct as intentional under the \textit{Boynton Cab} rule).

\textsuperscript{38} See, e.g., ARIZ. REV. STAT. ANN. § 23-775(2) (2012) (stating that where employees are disqualified for "wilful or negligent misconduct", the employee is disqualified from benefits); MINN. STAT. ANN. § 266.095 subdiv. 6 (West 2007 & Supp. 2013) (defining employment misconduct as "any intentional, negligent, or indifferent conduct" that meets certain conditions); MD. CODE ANN., LAB. & EML., § 8-1003 (LexisNexis 2008 & Supp. 2012); Dep't of Labor, Licensing & Regulation v. Hider, 706 A.2d 1073, 1079 (Md. 1998) (holding that intentional misbehavior is not required for a finding of misconduct).
C. THE LOUISIANA STATUTORY DEFINITION

The question herein is whether Louisiana belongs to the Boynton Cab states that require intentional actions or if it has joined those minority states that reduce the burden on the employer. In 1990, the Louisiana Legislature added, for the first time, a statutory definition for misconduct. The definition of misconduct (the 1990 amendment) reads as follows: "Misconduct means mismanagement of a position of employment by action or inaction, neglect that places in jeopardy the lives or property of others, dishonesty, wrongdoing, violation of a law, or violation of a policy or rule adopted to insure orderly work or the safety of others."39 Notably, the list of actions that equate to misconduct are in the disjunctive—any of those enumerated actions give rise to a finding of misconduct, and one clause does not modify the others.

Prior to 1990, the Louisiana Supreme Court in Charbonnet v. Gerace made it abundantly clear that Louisiana's UI system required an intentional act for a finding of disqualifying misconduct.40 The wording of the court's decision in Charbonnet is important. The court held:

For a claimant to be disqualified from benefits because of 'misconduct connected with his employment' under La. R.S. 23:1601(2), the 'misconduct' must have resulted from willful or wanton disregard of the employer's interest, from a deliberate violation of the employer's rules, or from a direct disregard of standards of behavior which the employer has the right to expect from his employees. The type of behavior which is considered 'willful misconduct' is intentional wrong behavior.41

The supreme court left no doubt in its wake after Charbonnet: Louisiana required an intentional act, in line with Boynton Cab, to disqualify discharged employees from obtaining benefits. Since the legislature added the statutory definition in § 1601, after Charbonnet was decided, the question remains whether the Charbonnet rule has been replaced, overturned, or

41. Id. (emphasis added) (internal citations omitted).
Currently, there is a circuit split as to whether the 1990 amendment still mandates an intentional act for a finding of misconduct. The Louisiana second, third, fourth and fifth circuits have all found that, despite the addition of words such as “mismanagement” and “neglect,” the amendment only served to confirm the Charbonnet rule rather than replace it. On the other hand, the first circuit stands alone in holding that the 1990 amendment supplanted the Charbonnet definition in part by allowing some acts of negligence to constitute disqualifying misconduct. To date, the Louisiana Supreme Court has not addressed the effect of the 1990 amendment nor has it addressed the discrepancies of the various rulings from the appellate courts. In fact, the Louisiana Supreme Court has ruled on only one case since 1990 regarding an interpretation of misconduct under the UI scheme, but that case was decided nearly twenty years ago.

III. ANALYSIS: INTENTIONAL VERSUS NEGLIGENT

Every Louisiana court of appeal has had the opportunity to address the impact of the 1990 amendment on the definition of disqualifying misconduct. The supreme court was abundantly clear in both Charbonnet and Cadwallader v. Administrator, Office of Employment Security, State of Louisiana that intentional actions were the baseline requirement to disqualify a discharged employee. Four of the five circuits have expressly held that the 1990 amendment made no change in the law so that

42. These circuits have revisited this holding several times. See, e.g., Delta Am. Healthcare, Inc. v. Burgess, 41,108, pp. 4-6 (La. App. 2 Cir. 5/17/06); 930 So. 2d 1108, 1111-12; Gobert v. La. Dep't of Emp't Sec., 94-1018, pp. 4-5 (La. App. 3 Cir. 3/8/95); 651 So. 2d 508, 511; Lockett v. Forster, 2004-0171, pp. 5-6 (La. App. 4 Cir. 6/23/04); 879 So. 2d 323, 326-27; Taco Bell Corp. v. Perkins, 95-225, pp. 5-6 (La. App. 5 Cir. 9/26/95); 662 So. 2d 34, 36-37.

43. See Fontenet v. Cypress Bayou Casino, 2006-0300, p. 7 (La. App. 1 Cir. 6/8/07); 964 So. 2d 1035, 1040-41 (en banc).

44. Desira v. Truly, 95-0759 (La. 5/12/95); 654 So. 2d 342 (per curiam).

45. Cadwallader v. Adm'r, La. Dep't of Emp't Sec., 559 So. 2d 1346 (La. 1990).

46. Charbonnet v. Gerace, 457 So. 2d 676, 678 (La. 1984). Cadwallader was decided in April 1990, just a few months before the Louisiana legislature amended La. Rev. Stat. Ann. § 23:1601 (2011 & Supp. 2014). Cadwallader, like Charbonnet, could not have been clearer on the subject. The supreme court in Cadwallader held that a failure to disclose a psychological condition in an employment application “was not the type of willful or intentional disregard of the employer's interests necessary to constitute 'misconduct.'” Cadwallader, 559 So. 2d at 1347.
the Charbonnet rule is still viable. A review of the cases in these four circuits is instructive and particularly noteworthy for their dearth of actual explanation as to why a statutory amendment did not change the law.

A. Delta American v. Burgess

Of the four circuits, the case that comes the nearest to explaining this discrepancy is Delta American v. Burgess. In Delta American, an employee at a group home for physically and mentally disabled patients fell asleep on the job after taking blood pressure medication that made him drowsy. The employer's policy expressly prohibited sleeping on the job. Despite the policy and the fact that he was responsible for the physical care of the home's residents, the employee took the sleep-inducing medication because he had a headache. The employee sat down to rest and ultimately fell asleep. After discovering the employee asleep on the job, the employer discharged the employee on the grounds of disqualifying misconduct. While the employer argued that the employee did in fact commit an intentional act by consciously taking the medicine and going to sleep, the employer argued, in the alternative, that the statute only required the lesser threshold of an act of mismanagement or neglect, rather than an intentional act.

The court held firm on the requirement of an intentional act and rejected the employer's argument in favor of a lesser intent requirement, holding that the statute only required "a finding of an intentional act, rather than an act of mismanagement or neglect, to disqualify the claimant from unemployment

47. See supra note 42 and accompanying text.
49. Id. at 1109-10.
50. Id. at 1109.
51. Id. at 1110.
52. Delta, 930 So. 2d at 1110. The employee testified that the medication made him sleepy when he took it at bedtime. Id. Despite this admission, the court found that the employee did not know the medication would make him sleepy. Id. at 1113.
53. Id. at 1110.
54. Id. at 1111. While not specifically stated in the court's opinion, it is plausible that the employer could have argued that the employee's act of sleeping on the job constituted "neglect that places in jeopardy the lives or property of others," given that he was responsible for working with physically disabled individuals in a health care facility. See LA. REV. STAT. ANN. § 23:1601(2)(a) (2011 & Supp. 2014).
Inexplicably, however, the court did not expound on why a statute that expressly defines misconduct as an act of “mismanagement” or “neglect” does not in fact include acts of mismanagement or neglect. Instead, the court stated that the legislature intended the amendment to be “illustrative” and one that affirmed rather than changed the need to prove deliberate or intentional misconduct.56

The Delta American court offered two separate rationales for its conclusion. First, it argued that in assessing whether to grant unemployment compensation, the analysis should be construed in favor of awarding benefits. Thus, the statute should be interpreted in such a way so as to disfavor disqualifying circumstances.57 Presumably, this interpretation is derived from Louisiana’s public policy interest in preventing the menace of unemployment;58 however, it in no way addresses the salient question that runs throughout these cases, which is whether the legislature expressly repudiated by statute its former reliance on intentional actions for disqualifying misconduct. That question has yet to be expressly addressed in the second, third, fourth, or fifth circuits. Even though the UI system should be interpreted so as to favor the awarding of benefits, no such interpretation is allowed if the statute is clear on its face.59

Second, the court ignored the actual words in the statute and relied instead on jurisprudence that did not and could not have interpreted the meaning of the 1990 amendment. The court stated that jurisprudence in the second circuit and every other circuit continued to hold an employer’s feet to the fire of proving an intentional act requirement.60 That rationale needs a closer

---

56. Id. at 1112.
57. Id. at 1111; see also Gobert v. La. Dep’t of Emp’t Sec., 94-1018, p. 5 (La. App. 3 Cir. 3/8/95); 651 So. 2d 508, 511; Lockett v. Forster, 2004-0171, p. 6 (La. App. 4 Cir. 6/23/04); 879 So. 2d 323, 327; Taco Bell Corp. v. Perkins, 95-225, p. 6 (La. App. 5 Cir. 9/26/95); 662 So. 2d 34, 37.
59. See LA. CIV. CODE ANN. art. 9 (2013) (“When a law is clear and unambiguous . . . the law shall be applied as written . . . ”).
60. Delta, 930 So. 2d at 1111. At the time Delta American was decided, the first circuit had not yet changed course on the issue. Therefore, even the first circuit had held that an intentional act was required for disqualifying misconduct. See St. Tammany Parish Sch. Bd. v. State, Dep’t of Labor, Office of Emp’t Sec., 2001-0757, pp. 6-7 (La. App. 1 Cir. 5/10/02); 818 So. 2d 914, 918, overruled by Fontenet v.
look. To fully analyze these holdings, one needs to follow the line of case citations back to the originating opinion. One case cites to another, and another, and another, but nowhere in the chain is there a coherent explanation of why the 1990 amendment failed to change the law. After following all of these cited cases back to the originating opinion, one would expect to find some legal reasoning that actually supports the conclusion that the 1990 amendment had no legal effect. But, unfortunately, no such opinion exists.

B. OTHER SECOND CIRCUIT DECISIONS

The Delta American court cited Lafitte v. Rutherford House, Inc.\textsuperscript{61} for the proposition that the second circuit requires an intentional act. However, a closer look at Lafitte reveals no sound legal reasoning to support an intentional act requirement. The court in Lafitte cited the 1990 amendment, but then summarily concluded, “This court has addressed the legislative definition of misconduct in unemployment compensation matters and concluded that ‘misconduct’ requires either intentional wrongdoing or negligence to such an extent as to manifest culpability . . . .”\textsuperscript{62} Basically, the court offered a restatement of their prior holdings without any justification.

But, the Lafitte court pointed to two more cases. The first of those cases was Wood v. Louisiana Department of Employment Security.\textsuperscript{63} Unfortunately, the court in Wood did not mention the 1990 amendment, despite the fact that the discharge at issue in the case occurred in 1991.\textsuperscript{64} Rather, the court routinely cited Charbonnet for the proposition that “[a]n element of intentional wrongdoing or wilful disregard” must be present for disqualifying misconduct.\textsuperscript{65} Perhaps this was just an oversight by the court,

\footnotesize{\textsuperscript{61}Lafitte v. Rutherford House, Inc., 40,395 (La. App. 2 Cir. 12/14/05); 917 So. 2d 684; see also Delta, 930 So. 2d at 1111.}
\footnotesize{\textsuperscript{62}Lafitte v. Rutherford House, Inc., 40,395, p. 4 (La. App. 2 Cir. 12/14/05); 917 So. 2d 684, 687. The court in Lafitte also cited two pre-1990 cases to justify this position. \textit{Id.} (citing Lowery v. Whitfield, 521 So. 2d 815 (La. Ct. App. 1988); Jenkins v. Blache, 471 So. 2d 909 (La. Ct. App. 1985)). Those cases, obviously, are irrelevant to the effect the 1990 amendment had on the state of unemployment law.}
\footnotesize{\textsuperscript{63}Wood v. La. Dep't of Emp't Sec., 25,545 (La. App. 2 Cir. 2/23/94); 632 So. 2d 899.}
\footnotesize{\textsuperscript{64}\textit{Id.} at 900.}
\footnotesize{\textsuperscript{65}\textit{Id.} at 901.}
Def. of “Disqualifying Misconduct”

but regardless, surely Wood has no precedential value on the impact of the 1990 amendment.

On the other hand, the second case cited by Lafitte, Hardeman v. Blache, did mention the 1990 amendment. But, after quoting the statute, the Hardeman court cited the ubiquitous Charbonnet standard and fell back on the intentional act requirement expressed in preamendment jurisprudence. Once again, the court undertook no actual analysis to examine the effect of the amendment; it simply assumed without evaluation that the statute continues to require an intentional act despite the added statutory language.

And that is where the trail ends. After finally following the chain of citations to its end, there is nothing substantive that answers the question of the effect of the 1990 amendment, and more specifically, no explanation as to why the 1990 amendment did not change the law. The end of the string of cases is found at Hardeman and Wood, but these cases either did not address the amendment or relied on pre-1990 jurisprudence for their holdings.

More recent second circuit cases suffer from the same flaws. Johnson v. Dykes Oil Co. updated the trail of cases by citing to Delta American to justify requiring an intentional act. In a footnote, the court characterized the 1990 amendment as one that “defines misconduct in a more general sense.” The court declined to describe what in fact it means to define a legal concept in more general terms, nor did it describe what that general sense actually is. In another unpublished opinion in 2013, the second circuit cited a pre-1990 case to hold that misconduct “is used to connote intentional wrongdoing” and that “[a]n intent to do wrong must be present.”

67. The court in Hardeman also cited Settoon v. Berg, 577 So. 2d 338 (La. Ct. App. 1991), to support its statement that the law requires willful or intentional acts. Hardeman, 605 So. 2d at 674. However, in Settoon, an employer discharged the employee in 1988, and the court there noted, in a footnote, that the 1990 amendment did not apply in that case. Settoon, 577 So. 2d at 340 & n.1. Therefore, Settoon is not relevant on the issue of the effect of the 1990 amendment.
68. Johnson v. Dykes Oil Co., 46,462, p. 6 (La. App. 2 Cir. 8/10/11); 72 So. 3d 418, 422.
69. Id. at 421 n.2.
70. Dyer v. Nursecall Nursing & Rehab/Irving Place Assocs., 47,927, p. 5 (La. App. 2 Cir. 5/8/13); 135 So. 3d 688, 691 (citing Banks v. Adm'r of Dep't of Emp't Sec.
C. THIRD, FOURTH, AND FIFTH CIRCUIT JURISPRUDENCE

The other three circuits fare no better when closely scrutinized. As for the third circuit, *Gobert v. Louisiana Department of Employment Security* sings a different verse of the same tune as the second circuit.\(^7\) *Gobert* cited the *Charbonnet* intentional act standard and then noted that this standard "has been applied by the Second Circuit and the Fourth Circuit in interpreting the statute as amended in 1990."\(^7\) Just as with *Lafitte*, the court cited unhelpfully and unpersuasively to *Wood* and *Hardeman* for support.\(^7\) Then, without any explanation, the *Gobert* court announced, "We agree with our brethren of the Second and Fourth Circuits, and apply the well established definition of misconduct."\(^7\) The court in *Gobert* did mention the presumption that the term misconduct is construed in favor of benefits, but the court did not address whether the 1990 amendment changed the state of unemployment law.\(^7\)

In another third circuit case, *Harsco Corp. v. Victoria*,\(^7\) the employer specifically raised the issue that the amendment no longer mandates a finding of an intentional act. But, just as in *Delta American*, the court dismissed that argument by listing a litany of cases holding that misconduct requires an intentional act. Interestingly, the court held, "[W]e decline to change our course without clear legislative expression signaling its intent to abandon the 'willful or wanton' requirement."\(^7\) It is difficult to imagine what else the legislature needed to do to signal its intent to change course. The third circuit seemingly did not view the inclusion of words like mismanagement and neglect—the legal opposites of intent—as a signal to change the law. Nor did the *Harsco* court attempt to distinguish these new phrases or explore why the legislature only intended to reiterate, rather than change, the law.

In the fourth circuit, the *Lockett v. Forster* court made a

---

\(^{71\text{.}}\) Gobert v. La. Dep't of Emp't Sec., 94-1018 (La. App. 3 Cir. 3/8/95); 651 So. 2d 508.
\(^{72\text{.}}\) Id. at 511.
\(^{73\text{.}}\) Id.
\(^{74\text{.}}\) Id.
\(^{75\text{.}}\) Id.
\(^{76\text{.}}\) Harsco Corp. v. Victoria, 01-1486 (La. App. 3 Cir. 3/20/02); 812 So. 2d 871.
\(^{77\text{.}}\) Id. at 874.
Def. of "Disqualifying Misconduct"

similar argument. As before, the court in Lockett found that an intentional act is required because the four circuits that addressed the matter post-amendment continued to apply the intentional act standard. The Lockett court provided no further explanation other than a string of citations to prior cases. Lockett cited its prior case, Emke v. Mouton, to support its finding. Emke did not analyze the issue either, but simply cited Hardeman to justify an intentional act requirement, stating, "We agree with the Second Circuit, and apply the well established definition of misconduct."

Prior to Lockett, the fourth circuit reached the same conclusion, using the same sparse analysis, in Harris v. Houston. There, the court held that the statutory provision for disqualification "has been the subject of important judicial gloss which requires intentional misconduct." Unfortunately, the court cited no relevant "gloss" whatsoever but instead justified its position with cites to primarily pre-1990 jurisprudence, ultimately ending with Charbonnet to validate its conclusion. Interestingly, Judge Byrnes's concurring opinion acknowledged the contrary view that the 1990 amendment no longer requires intentional acts. Judge Byrnes noted the absence of binding precedent to support the fourth circuit's holding and the lack of any words indicating intentionality in the 1990 amendment. By and large, however, Judge Byrnes's concurrence has fallen on deaf ears, having very little persuasive effect on future court

78. Lockett v. Forster, 2004-0171 (La. App. 4 Cir. 6/23/04); 879 So. 2d 323.
79. Id. at 326.
80. Id. (citing Emke v. Mouton, 617 So. 2d 31 (La. Ct. App. 1993)).
81. Emke, 617 So. 2d at 33. Further, a more recent fourth circuit case, New Orleans Private Patrol Serv., Inc. v. Kuykendall, 2011-1052, p. 7 (La. App. 4 Cir. 2/29/12); 85 So. 3d 793, 797, continued to apply the intentional act standard without explaining why the 1990 amendment did not change the law. The justification, as with the other cases previously discussed, is a string of citations to earlier cases. Id.
82. Harris v. Houston, 97-2847 (La. App. 4 Cir. 11/4/98); 722 So. 2d 1042.
83. Id. at 1044.
84. Id. The court did cite to Holtry v. Truly, 94-1348 (La. App. 4 Cir. 12/15/94); 647 So. 2d 1335. That case does nothing more than cite to a single block quote from Charbonnet to justify requiring an intentional act. Holtry, 647 So. 2d at 1338. Thus, Holtry offers no substantive basis for interpreting the 1990 amendment.
85. Harris, 722 So. 2d at 1046-47 (Byrnes, J., concurring). Judge Byrnes concurred, rather than dissented, because he felt he was bound by the fourth circuit's decision in Emke. Id. at 1047.
86. Id. at 1046-47 (Byrnes, J., concurring).
decisions.\textsuperscript{87}

Finally, the fifth circuit considered this issue in \textit{Taco Bell Corp. v. Perkins}.\textsuperscript{88} The court’s rationale in \textit{Taco Bell} sounded eerily similar to that provided by the \textit{Gobert} court. After describing the amendment, the court presented the same laundry list of cases that employed the intentional act standard.\textsuperscript{89} The court then, without further explanation, declared, “We agree with our brethren on the Second, Third and Fourth Circuits, and apply the well established definition of misconduct.”\textsuperscript{90}

Amazingly, not a single court in the second, third, fourth, or fifth circuit actually explained why the 1990 amendment has no effect on the law. Rather, almost every case affirmed this holding by citing to cases, which in turn cite to other cases, all of which inevitably led to \textit{Charbonnet}. \textit{Charbonnet} is not probative on the issue of whether the definition of misconduct changed in 1990, yet four circuits have consistently relied on it. Not a single case explains why, as the court in \textit{Harsco} summarily holds, the legislature did not intend to signal a change in course with the 1990 amendment. Without such an explanation, those courts that continue to cling to the intentional act requirement will remain on shaky legal ground.

\textbf{D. A BETTER APPROACH: LOUISIANA’S UI SCHEME SHOULD NOT REQUIRE AN INTENTIONAL ACT}

The 1990 amendment should be read to eliminate the absolute requirement of an intentional act. To be clear, this Article does not advocate for an ordinary negligence standard to constitute disqualifying misconduct. The words of the statute give a detailed description of the kinds of employee conduct that give rise to disqualification; only certain kinds of negligent actions, such as mismanagement or neglect, are misconduct.\textsuperscript{91} The plain language of the statute should be given effect to allow

\textsuperscript{87} Only one case, Fontenet v. Cypress Bayou Casino, 2006-0300, pp. 6-7 & n.4 (La. App. 1 Cir. 6/8/07); 964 So. 2d 1035, 1039-41 & n.4 (en banc), has cited Judge Byrnes’s concurrence in support. Only one other Louisiana case has cited Judge Byrnes’s concurrence at all, but did so only for the proposition that the fourth circuit continues to use the intentional act standard. See Brandon v. Lockheed Martin Corp., 2003-1917, p. 10 n.4 (La. App. 4 Cir. 4/14/04); 872 So. 2d 1232, 1239 n.4.

\textsuperscript{88} Taco Bell Corp. v. Perkins, 95-225 (La. App. 5 Cir. 9/26/95); 662 So. 2d 34.

\textsuperscript{89} \textit{Id.} at 37.

\textsuperscript{90} \textit{Id.}

certain nonintentional actions to disqualify an employee from benefits if those actions fall within the enumerated categories listed in the statute.

1. IT IS PRESUMED THE STATUTE HAS CHANGED

It is undeniably true that, prior to 1990, Louisiana jurisprudence required intentional acts for all cases of disqualifying misconduct. Charbonnet, and later Cadwallader, was crystal clear. No judge, lawyer, or litigant could have possibly wondered whether the law required intentional acts. The court expressly held that the type of behavior that constituted disqualifying misconduct was only intentional misconduct.92

Then, in 1990, the legislature added a definition for misconduct. The law presumes that the legislature knows the state of the law at the time it enacts a new statutory provision.93 Given that presumption, the legislature knew with absolute certainty that intentional acts were required to prove misconduct. So, if the second circuit is correct, and this statutory amendment was simply illustrative, what purpose would be served by passing a law that simply restated what was already true?

The legislature clarifies the law when existing law is unclear.94 When the supreme court interprets a statute that interpretation becomes part of the substantive law.95 Thus, the substantive law at the time of the 1990 amendment clearly provided that an intentional act was required to prove misconduct and there was nothing that the legislature needed to clarify.96 Surely, the legislature has an interest in clarifying the law if the issue is unclear or if the jurisprudence on the issue has sent mixed messages. However, here there was no issue to clarify

93. See Borel v. Young, 2007-0419, pp. 7-8 (La. 11/27/07); 989 So. 2d 42, 48.
94. St. Paul Fire & Marine Ins. Co. v. Smith, 609 So. 2d 809, 817 (La. 1992) (stating that, when the existing law is unclear, a subsequent statute that clarifies the law is interpretative and not a substantive change).
95. See id. at 819, 822. The court in St. Paul Fire held that a law that changed the existing supreme court interpretation of the statute was a substantive change and one where an inference of "legislative intent to 'clarify' the existing law" was misplaced. Id. at 820.
96. See Bourgeois v. A.P. Green Indus., Inc., p. 11 (La. 4/3/01); 783 So. 2d 1251, 1260 (stating that when the Louisiana Supreme Court interprets a statute, "it is saying what the law is").
and no ambiguity to resolve. The legislature would not have accomplished anything by amending a statute that retained the completely understood definition of misconduct. Perhaps Delta American's argument that the amendment is illustrative would have some minimal amount of force if Charbonnet's declaration had been unclear, littered with grammatical qualifiers, or used words like "might," "maybe," or "possibly." Had that been the case, there may have been a need for the legislature to eliminate confusion. That, of course, was not the case. While it is true the legislature has the power to codify well-established judicial holdings, there is usually no practical purpose in doing so when a statutory amendment would have no real-world effect.97

The more likely conclusion is that the legislature's intent in passing the 1990 amendment was to change the law. A fundamental maxim of statutory interpretation is that it is presumed that a change in the wording of a statute connotes a change in the law, and the Louisiana Supreme Court has, on numerous occasions, recognized this long-standing rule of interpretation.98 The full discussion on the subject found in Borel v. Young is particularly instructive:

A long line of jurisprudence holds that those who enact statutory provisions are presumed to act deliberately and with full knowledge of existing laws on the same subject, with awareness of court cases and well-established principles of statutory construction, with knowledge of the effect of their acts and a purpose in view, and that when the Legislature changes the wording of a statute, it is presumed to have intended a change in the law.99

This rule of interpretation applies neatly to the presumptive effect of the 1990 amendment on disqualifying misconduct. The legislature is presumed to have acted deliberately and with full knowledge that Charbonnet unequivocally held that disqualifying

97. It may be true that wholesale revisions of parts of the Civil Code restate well-established law for purposes of internal consistency. See Christopher M. Hannan, Comment, Prescription Lenses: How Louisiana Courts Should Apply the Revised Articles Governing Thirty-Year Acquisitive Prescription of Apparent Servitudes, 53 LOY. L. REV. 937, 978 (2007). However, a single amendment of a part of one statute does not share that same purpose.
98. See State v. Johnson, 2003-2993, p. 14 (La. 10/19/04); 884 So. 2d 568, 576-77; State v. La. Riverboat Gaming Comm'n, 94-1872, p. 17 n.10 (La. 5/22/95); 655 So. 2d 292, 301 n.10.
misconduct must be intentional. Clearly, the legislature changed the wording of § 1601 by adding a statutory definition of misconduct where none existed before, and as a consequence, the inescapable and only logical conclusion is that the legislature intended a change in the law. Indeed, as recently as 2013, the Louisiana Supreme Court continued to support this rule of interpretation by holding that when the legislature removes a statutory provision from a statute, it intends to change the law.

Based on the foregoing, it must be presumed that the 1990 amendment changed the law.

2. NEGLIGENCE VERSUS INTENTIONALITY

Proving that the legislature intended to change the law does not answer the question of what exactly it intended to change. The key here is recognizing the difference between an intentional act and a negligent act. The statutory definition includes two key phrases that indicate something less than an intentional act in defining disqualifying conduct—"mismanagement of a position of employment by action or inaction" and "neglect that places in jeopardy the lives or property of others."

The word "mismanagement" suggests something less than an intentional act. Mismanagement connotes a situation where things go awry not because of a wrongful desire to do harm but due to unintentional incompetence or inexperience.
Importantly, the mismanagement at issue must be one where a person's position is improperly handled, either through action or inaction.104 The Louisiana Supreme Court, albeit in another context, has distinguished mismanagement from intentional acts. In In re Pharr,105 the respondent was before the Louisiana Supreme Court for attorney disciplinary proceedings arising from misappropriation of settlement proceeds.106 The supreme court found that a lesser sanction was appropriate because the respondent's behavior was mere mismanagement.107 Specifically, the court stated, “we believe respondent's actions were the product of incompetence and fiscal mismanagement rather than any intentional desire to harm the interests of his clients.”108 The court demonstrated that mismanagement is not an intentional act by comparing and eventually distinguishing the two kinds of behaviors. In other words, the attorney's actions were acts of mismanagement as opposed to acts of intentionality.

Second, acts of “neglect” are clearly different in kind from intentional acts. The jurisprudence has long discussed the well-established distinction between intentional torts and acts of negligence.109 As legal concepts go, these two are opposites. The Louisiana Supreme Court has specifically stated that negligence signifies “the absence of intentional conduct.”110 Negligence has been defined as “[t]he failure of ‘due care’”111 or “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.”112 Importantly, the court in Sova v. Cove Homeowner’s Association, citing Black’s Law Dictionary, specifically excluded intentional actions from the definition of negligent acts.113 Conversely, intentional acts

105. In re Pharr, 2006-2283 (La. 2/22/07); 950 So. 2d 636.
106. Id. at 638-39.
107. Id. at 641.
108. Id.
109. See Bazley v. Tortorich, 397 So. 2d 475, 480 (La. 1981); Caudle v. Betts, 512 So. 2d 389, 390-91 (La. 1987); Kelly v. Boise Bldg. Solutions, 2011-1116, pp. 6-7 (La. App. 3 Cir. 5/2/12); 92 So. 3d 965, 970.
110. Thibodeaux v. Jurgesky, 2004-2004, p. 7 (La. 3/11/05); 898 So. 2d 299, 304 (stating that, in a case on medical malpractice due to a failure to obtain informed consent, the only cause of action in such cases “sounds in negligence,” thereby automatically precluding the need to prove intentional conduct).
112. Sova v. Cove Homeowner’s Ass’n, 2011-2220, p. 16 (La. App. 1 Cir. 9/7/12); 102 So. 3d 863, 874 (citing BLACK’S LAW DICTIONARY 1056 (7th ed. 1999)).
113. Id.
Def. of “Disqualifying Misconduct”

require some culpability. Intentional acts are those where the person consciously desires the result of the act.\(^1\) The actor committing the intentional act must either want the results of the act or know that the result is substantially certain to follow from that conduct.\(^2\)

Acts of negligence, or neglect, clearly require something less than the intent to cause harm or the intent to desire the consequences of one's actions. The legislature, pursuant to the presumption that it understands the distinction between an intentional act and a negligent one,\(^3\) signaled its choice to move away from the unmoving requirement of an intentional act. It used the term “neglect,” a form of the word “negligence,” so it is clear that the legislature meant that some negligent actions give rise to a finding of disqualifying misconduct. To argue that “neglect” means something other than negligence is fanciful and denies the straightforward meaning of the statute's words. Just as with mismanagement, the deliberate use of the term neglect in the statute means that some kinds of negligent actions must fall under the purview of misconduct. Thus, the legislature did not intend to retain and restate the intentional act requirement for misconduct as interpreted by Charbonnet. It would be the height of absurdity for the legislature to “illustrate” that misconduct must be intentional by describing those same acts as mismanagement and neglect.

Once again, not all acts of neglect are acts of misconduct. Only those acts of neglect that place in jeopardy the lives or property of others equate to misconduct.\(^4\) However, this subset of negligent actions might very well have altered the outcome of cases had the rule been applied properly, where an employee either mismanaged a position of employment or inexcusably endangered life or property by nonintentional acts.

E. Other States' Approaches

It is important to note that the natural reading of the statute does not make Louisiana wildly out of line with its sister states. A minority of other states have also lowered the intentionality
requirement. It is not beyond the realm of legal comprehension to imagine that the Louisiana legislature would seek to make it slightly more difficult for employees to obtain UI benefits.

Interestingly, in 1993, Texas adopted a statutory definition of misconduct that closely mirrors Louisiana’s definition. Texas’s misconduct statute and the accompanying jurisprudence are particularly relevant to the issue presented herein because the statutory definitions of misconduct are nearly identical to the 1990 amendment. Both statutes describe acts of mismanagement of a position and neglect that place in jeopardy the lives or property of others. In Potts v. Texas Employment Commission, a Texas appellate court upheld a denial of benefits under Texas law where the “claimant failed to use a reasonable degree of care in the performance of his duties,” and found that such failure “constitutes negligence which places in jeopardy the property of others and misconduct connected with the work.” This Texas court, interpreting statutory language almost identical to that provided by the 1990 amendment, found that acts of negligence could constitute disqualifying misconduct. Even though this jurisprudence is from a sister state, it is certainly persuasive given the similarities in the two statutes.

F. THE SUPREME COURT’S VIEW

Finally, the Louisiana Supreme Court has had one, and only one, opportunity to analyze disqualifying misconduct after the 1990 amendment. That case, Desira v. Truly, was a short per curiam decision. Curiously, no Louisiana court has cited to, referenced, or made mention of this case when determining disqualifying misconduct. While the case is brief and the discussion of the law is short, some implications from this

---

118. See supra note 38 and accompanying text.
119. TEX. LAB. CODE ANN. § 201.012 (West 2006). That statute reads: “Misconduct’ means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and safety of employees.” Id. While it is unclear whether or not Texas intentionally adopted Louisiana’s standard as its own, Texas court cases on the interpretation of their statute are certainly, at a minimum, probative on how Louisiana should interpret its misconduct statute.
120. TEX. LAB. CODE ANN. § 201.012 (West 2006).
121. Id.
123. Desira v. Truly, 95-0759 (La. 5/12/95); 654 So. 2d 342 (per curiam).
Def. of “Disqualifying Misconduct”

decision can be derived.

In Desira, an employer terminated an employee for failing to report to his supervisor’s office upon arriving late.\(^{124}\) The employee telephoned the supervisor and, during that conversation, raised his voice and argued with him.\(^{125}\) The court found that these actions did not rise to the necessary level of misconduct.\(^{126}\) The court, rather than relying on Charbonnet's holding, stated that such conduct was not misconduct “as defined in La. R.S. 23:1601(2).”\(^{127}\) Therefore, the Desira court relied on the statutory definition of misconduct rather than its prior jurisprudence. It could have easily relied on Charbonnet, found no intentional act, and routinely resolved this issue had the meaning of misconduct remained unchanged after 1990. Instead, it chose to expressly rely on the statute, perhaps suggesting a different path from the pre-1990 jurisprudence. Although the supreme court does not directly address the effect of the 1990 amendment, its analysis indicates that the appellate courts’ reliance on Charbonnet might be misplaced.

G. THE FIRST CIRCUIT’S DECISIONS

The Louisiana first circuit has navigated a different course. In 2007, the first circuit delivered an opinion in Fontenet v. Cypress Bayou Casino that, for the first time in Louisiana, held that something less that an intentional act is, in some cases, sufficient to deny discharged workers their UI benefits.\(^{128}\) Finally, a Louisiana court scrutinized the statutory amendment to determine if the legislature changed the meaning of misconduct in 1990.\(^{129}\)

Sitting en banc, the first circuit concluded that the statutory definition of misconduct “supplant[ed] the jurisprudentially created standard of Charbonnet, Banks, and other similar cases.”\(^{130}\) Noting that the language of the statute departs from

---

124. Desira v. Truly, 95-0759 (La. 5/12/95); 654 So. 2d 342, 342 (per curiam).
125. Id.
126. Id.
127. Id.
128. Fontenet v. Cypress Bayou Casino, 2006-0300, p. 7 (La. App. 1 Cir. 6/8/07); 964 So. 2d 1035, 1040-41 (en banc).
129. Id. at 1039-40. The court even acknowledged this fact, stating that other courts did not address “why in 1990 the legislature decided to adopt a statutory definition of the term.” Id. at 1039.
130. Id. at 1041.
the traditional *Boynton Cab* categories of misconduct, the court concluded that the legislature intended to deviate from the prior standard. More pointedly, the court found it highly unlikely that the legislature, by "mere oversight," would have drafted the statute without using words such as "intentional" if it intended to continue the intentional act requirement. Under the facts of the case, the court found that the employee's actions constituted neglect that jeopardized the property of others and disqualified the employee from benefits.

Other unpublished first circuit cases continue to adhere to *Fontenet's* core holding, consistently stating that the behavior in question does not need to be intentional. The second circuit acknowledged that the first circuit blazed a new trail, but put forth no analysis to rebut or challenge the first circuit's stance. It simply admitted that a circuit split in fact exists, but did not expound on why its holding is preferable.

Given that the first circuit's view on employee misconduct is aligned with the general principles of statutory interpretation outlined in this Article, the first circuit's change in course is undoubtedly the legally correct one. Regardless of whether employees should, from a policy perspective, be denied UI benefits for some unintentional behavior, courts are only empowered to interpret the law as written.

**H. ANALYZING PRIOR CASES USING THE NEW INTERPRETATION**

The change proposed in this Article would assuredly alter the outcome of cases where the employee's conduct is not intentional but still a form of mismanagement or neglect covered by the statute. To illustrate the effect of the 1990 amendment, the sections below examine a select number of cases to determine whether the outcome of the case would be the same if the courts adopted the correct standard.

---

131. *Fontenet v. Cypress Bayou Casino*, 2006-0300, p. 7 (La. App. 1 Cir. 6/8/07); 964 So. 2d 1035, 1040-41 (en banc).

132. *Id*.

133. *Id.* at 1041 n.8.

134. *E.g., Williams v. Eysink*, 2012-1821, p. 5 (La. App. 1 Cir. 4/26/13); 2013 WL 1791582, at *2; *Egan v. Sullivan*, 2012-0741, p. 3 (La. App. 1 Cir. 12/21/12); 2012 WL 6677918, at *1.

135. *Johnson v. Dykes Oil Co.*, 46,462, p. 4 n.2 (La. App. 2 Cir. 8/10/11); 72 So. 3d 418, 421 n.2.

136. *Fontenet*, 964 So. 2d at 1040.
1. **TACO BELL v. PERKINS**

In *Taco Bell v. Perkins*, a part-time shift manager for a fast-food restaurant closed the store on Christmas day.\(^{137}\) The company’s policy made clear that employees should not leave the store simultaneously and should instead be staggered, so that if one employee is accosted, the other could call for help.\(^{138}\) On the night in question, the manager allowed the entire crew to leave the store at the same time.\(^{139}\) An assailant robbed the crew at gunpoint and stole nearly $2,000.\(^{140}\) The manager claimed she did not know of the departure policy and had little experience in closing the store.\(^{141}\)

The court, after holding that an intentional act was required to disqualify the claimant, found that she lacked the requisite intent to disqualify her for benefits.\(^{142}\) Assuming that the statute requires an intentional act, the court’s reasoning is perfectly sound and logical. There was no evidence presented in the opinion to support the notion that she deliberately violated company policy.

The outcome of this case would likely be entirely different had the court used the correct standard. While she may not have intended to violate company policy, she clearly committed neglect that jeopardized the property of Taco Bell. Her negligent actions of failing to follow company policy directly led to Taco Bell losing $2,000. Even had the money not actually been stolen, this improper instruction to her crew, at a minimum, put that money in jeopardy, and at most, the employees’ lives. Further, as a manager in a position of supervisory authority, her instructions on that night are tantamount to a mismanagement of her position. It was her job to know the company rules on closing the store, yet she gave the wrong instruction, or at best, simply did not consider the ramifications of the employees leaving the store.

---

\(^{137}\) Taco Bell Corp. v. Perkins, 95-225, p. 3 (La. App. 5 Cir. 9/26/95); 662 So. 2d 34, 35.

\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Id. at 35, 37.

\(^{142}\) *Taco Bell*, 662 So. 2d at 37. While the court did not precisely identify why she lacked the requisite intent, it seems obvious from the court's discussion of the facts that her lack of understanding of the rules for closing, coupled with her inexperience, led the court to conclude that she did not commit an intentional act. *See id.* at 35, 37.
all at once. So, had the 1990 amendment been given the force it deserved, the claimant would have been disqualified from UI benefits.

2. **DELTA AMERICAN V. BURGESS**¹⁴³

   The court in *Delta American* found that the employee in question did not intend to fall asleep and, absent any sort of intentional act, could not be denied UI benefits.¹⁴⁴ While it is debatable whether the claimant engaged in intentional misconduct,¹⁴⁵ his behavior did rise to the level of neglect that placed the lives of others in jeopardy. He was responsible for “the physical care of the facility’s residents,” who were either physically or mentally disabled.¹⁴⁶ Sleeping on the job prevented him from being alert and able to quickly address an emergency situation that might befall one of the residents. Had some sort of emergency arisen, he would have been unable to resolve that situation while asleep. Clearly, even though no actual harm befell the residents while he was asleep, his actions certainly put them in jeopardy. Even if he did not intend to fall asleep, his actions, including taking the medicine and resting to the point of falling asleep, were inexcusably negligent. Consequently, the 1990 amendment clearly dictates a finding of disqualification, whereas the erroneous Charbonnet standard called for a finding in favor of the awarding of benefits.

3. **HARSCO CORP. V. VICTORIA**

   The case of *Harsco Corp. v. Victoria* effectively illustrates that discharged employees would still retain their UI benefits if the behavior in question did not meet the statutory definition.¹⁴⁷

---

¹⁴³ See supra Part III.A (stating the facts of *Delta American Healthcare, Inc. v. Burgess*).
¹⁴⁴ Delta Am. Healthcare, Inc. v. Burgess, 41,108, pp. 8-9 (La. App. 2 Cir. 5/17/06); 930 So. 2d 1108, 1113.
¹⁴⁵ The claimant actually committed several intentional acts. First, he intentionally took the medication on the job, despite the fact that he knew it made him drowsy at bedtime. *Id.* He intentionally sat down for a minute, intentionally stopped working, and intentionally closed his eyes. *See id.* at 1110. It is hard to imagine how the claimant could not know and appreciate the possibility that he would fall asleep and the danger that might put the residents in if an emergency situation arose.
¹⁴⁶ *Id.* at 1109.
¹⁴⁷ *Harsco Corp. v. Victoria*, 01-1486, pp. 4-5 (La. App. 3 Cir. 3/20/02); 812 So. 2d 871, 874.
In *Harsco*, an employer terminated an employee for making numerous errors in shipments to the employer's customers. These mistakes were the result of simple "human error" and not out of intent to do the job incorrectly. The court found that the employee did not manifest any intentional wrongdoing or culpability, and thus qualified for benefits. There is little doubt that this conclusion is the correct one—these mistakes seem to be the garden-variety errors that all people are prone to make.

Importantly, the conclusion would have been the same even had the correct standard been used. Disqualifications for negligent actions can only arise if the claimant mismanages the position or if the neglect jeopardizes the lives or property of others. Neither category applies here. She did not mismanage her position, but rather made simple errors in processing shipments. Plus, this neglect did not place anyone's life or property in jeopardy. Customers did in fact complain about how the employee processed their shipments, but no property was at stake here and the misconduct did not put anyone's life in danger. Since her conduct did not involve dishonesty, wrongdoing, or violation of a law or a company rule, her conduct does not fit within any of the categories listed in the statute. Instead, her behavior only constitutes "inadvertencies or ordinary negligence in isolated instances," that has historically fallen outside the realm of employee misconduct. Importantly, accurately implementing the statute as written does not disqualify employees for all acts of negligence but only those that the statute specifically lists.

4. *DYER V. NURSECALL NURSING*

The case of *Dyer v. Nursecall Nursing* presents the classic scenario of the right conclusion but the wrong reasoning.

---

148. *Harsco Corp. v. Victoria*, 01-1486, p. 1 (La. App. 3 Cir. 3/20/02); 812 So. 2d 871, 872.
149. *Id.* at 874.
150. *Id.*
152. *See Harsco Corp. v. Victoria*, 01-1486, p. 1 (La. App. 3 Cir. 3/20/02); 812 So. 2d 871, 872.
There, the claimant worked as a registered nurse at a healthcare facility.\textsuperscript{156} She was in the process of distributing medication to patients on the psychiatric floor when an emergency call came in that requested her immediate assistance on another floor.\textsuperscript{157} She, seemingly absentmindedly, placed the medication near the patient and left to respond to the emergency.\textsuperscript{158} Later, someone found the medication in the patient's room and reported to the administrator that it was unattended.\textsuperscript{159} The facility's policy was clear that medicine could not be left unattended or unsecured.\textsuperscript{160} Even though she was aware of it, she failed to comply with the policy, which was in place for the safety of the patients in the facility.\textsuperscript{161} As a result, she was terminated.\textsuperscript{162}

The court found that the claimant committed intentional misconduct due to her "hasty decision resulting in her violation of the policy, a critical one in place for patient safety."\textsuperscript{163} The justification for finding an intentional act is flimsy at best. There was no evidence that she intentionally left the medication on the table because she thought it was not an important rule or that she thought she would not get caught. The clear gist of the facts is that a call alerted her to an emergency and left as quickly as she could to attend to it. She perhaps forgot about the medication in her haste to respond to the emergency. The court itself implies this by describing her decision as "hasty,"\textsuperscript{164} rather than deliberate or premeditated. Describing this as intentional misconduct is a stretch, to say the least.

Had the court wanted to justify a disqualification of benefits, it could have used the easy, straightforward application of the statutory definition of misconduct. Even if her actions were not intentional, her actions certainly constituted neglect that jeopardized lives of others. As a health care professional tasked with dispensing medication, it is obvious that leaving medication
unattended can endanger patients who decide to self-medicate. Indeed, the court noted that this medication rule was in place “for patient safety.”\textsuperscript{165} It was clear neglect to leave it on the patient’s table even if she did not mean to do so and even if other tasks preoccupied her mind. This is precisely the kind of situation that the statutory misconduct definition encompasses. Thus, the court in \textit{Dyer} could have reached the same conclusion, with much stronger justification, had it simply used the standard in the statute.

\textbf{IV. CONCLUSION: A CALL FOR SUPREME COURT REVIEW}

Courts are bound to interpret the law as written.\textsuperscript{166} Yet, in the case of the statutory definition of disqualifying misconduct, this is not occurring in four of the five appellate courts in Louisiana. The 1990 amendment evinces legislative intent to move away from the jurisprudential requirement of an intentional act to prove disqualifying misconduct. Despite the legislation’s enactment, most courts refuse to recognize the amendment as a change to the law.

The interpretation proposed herein would properly implement legislative intent by allowing limited acts of negligent behavior to lead to the disqualification of UI benefits. As it stands now, the 1990 amendment exists on paper alone. Four circuits are ignoring the amendment under the guise that it merely illustrated a principle that no one theretofore questioned. The more reasonable interpretation is that the legislature, in line with a number of other states, consciously decided to reduce the number of qualified employees filing for UI benefits.

This issue presents the quintessential legal question that cries out for supreme court review. The supreme court’s rules concerning writ applications for certiorari list five potential factors that the supreme court examines when deciding to grant a writ application. They are: (1) conflicting decisions of the various appellate circuits, (2) significant unresolved issues of law decided by an appellate court but unresolved by the supreme court, (3) overruling or modification of controlling precedent, (4) erroneous interpretation or application of constitution or laws, and (5) gross

\begin{footnotesize}
\begin{enumerate}
\item Dyer v. Nursecall Nursing & Rehab./Irving Place Assocs., 47,927, p. 5 (La. App. 2 Cir. 5/8/13); 135 So. 3d 688, 691.
\item LA. CIV. CODE ANN. art. 9 (2013).
\end{enumerate}
\end{footnotesize}
departure from proper judicial proceedings.\textsuperscript{167}

While Rule X says that "one or more"\textsuperscript{168} of these must ordinarily be present for a writ application to be granted, in this case, four of the five factors are present. The supreme court has granted certiorari in the past for the sole reason of resolving a circuit split in the appellate courts.\textsuperscript{169} There is no doubt that a circuit split exists on this issue, even if the split is four circuits to one.

Second, the effect of the 1990 amendment has never been adjudicated by the supreme court, despite its importance to those affected employees whose livelihood may very well hinge on the receipt of UI benefits. A statewide switch in the standard would undoubtedly affect many cases and many unemployed workers. Third, as it stands now, \textit{Charbonnet} is the last pronouncement on the issue of the intentional act requirement, and therefore the supreme court should act on whether its own ruling has been statutorily overruled. It is possible that the hesitancy to replace the intentional act standard by the second, third, fourth and fifth circuits comes from the fear of modifying supreme court precedent without prior supreme court approval. Finally, four circuits continue to erroneously apply, or not apply at all, a statutory amendment that has been in place for more than twenty years.\textsuperscript{170}

Some clarification is necessary to resolve these differences or to allow the legislature to further amend the statute should it disagree with the supreme court. Justice Knoll, in dissent, noted that the supreme court should limit its discretionary review to those cases "most likely to have a widespread impact on the development of the law of the state of Louisiana."\textsuperscript{171} With workers being discharged from employment on a routine basis, it is clear that correctly describing the state of disqualifying misconduct will profoundly affect the dispensation of benefits and the collection of UI taxes from employers. Despite the fact that

\begin{itemize}
\item \textsuperscript{167} LA. SUP. CT. R. X, § 1.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} E.g., Catahoula Parish Sch. Bd. v. La. Mach. Rentals, LLC, 2012-2504, p. 2 (La. 10/15/13); 124 So. 3d 1065, 1067.
\item \textsuperscript{170} The fifth factor—gross departure from proper judicial proceedings—is not an issue here.
\item \textsuperscript{171} Trascher v. Territo, 2011-2093, p. 2 (La. 5/8/12); 89 So. 3d 357, 369 (Knoll, J., dissenting).
\end{itemize}
the legislature enacted the 1990 amendment nearly twenty-five years ago, the supreme court has yet to examine its effect. The supreme court has only ruled on one solitary unemployment misconduct case since 1990, and its discussion in that case was exceedingly brief. Meanwhile, the appellate courts continue to struggle with how to apply this amendment. Having gone nearly twenty years without deciding an unemployment misconduct case, this is just the kind of issue Justice Knoll referenced that begs for supreme court review.

While each circuit should reconsider its interpretation of the 1990 amendment in line with the precepts laid forth in this Article, it is paramount that the supreme court resolve this issue in one fell swoop. This issue has percolated beneath the surface for years and has a significant and direct impact on the welfare and livelihood of a number of unemployed workers. A uniform supreme court decision has the power to eliminate the ambiguity and uncertainty that exists in this area of the law. To stave off further uncertainty in the lives of the newly unemployed, it is imperative that this happen soon.

172. Desira v. Truly, 95-0759 (La. 5/12/95); 654 So. 2d 342 (per curiam).