

Unemployment Compensation in the Broader Employment Law Context

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Best Practices

- Hire for fit - train for skills – a good attitude and work ethic are key ingredients of a good fit
- Classify workers correctly
- New hire paperwork – most important: W-4, then I-9, then workers' comp notices, then other items
- Keep actions fair, job-related, and as consistent with known policies as possible
- Signed, written wage agreements with each employee

Best Practices (cont'd)

- Pay an hourly or performance-based rate unless an employee clearly fits a salaried exemption category
- Get signed, written authorization for any pay deduction that is not ordered by a court or required by a law
- Give written or electronic earnings statements
- Give as much advance written notice as possible of pay and benefit changes
- UI claims: file timely claim responses and appeals, present testimony from firsthand witnesses, and present clear documentation of warnings, policies, and other relevant facts

New Hire Paperwork

- I-9, W-4 forms, workers' compensation notices
- Get the W-4 completed and signed before an employee performs any work
- Acknowledgement of receipt of policy HB
- Consent for drug testing / search policy, if applicable
- Consent for video surveillance, if applicable
- Consent for background checks, if not already obtained
- Agreements regarding pay, benefits, schedule, work location, and so on (with employment-at-will disclaimers)

What and Other SESAs Look For In Independent Contractor Cases

- Corporate status
- FEIN
- Registration with Texas Secretary of State
- TWC tax account number
- Reporting wages of their own employees
- Their own business cards
- Invoices on their own stationery
- Advertising
- Written contracts
- E-mails, letters, or other documentation relating to negotiating the parameters of the work
- Substantial investment in their own business

Final Warning

- Do not give a final warning until and unless the company is truly ready to sever ties
- A real final warning lets the employee know:
 - that it is the employee's last chance,
 - that no further chances will be given,
 - and that if the complained-of problem occurs even one more time, the employee will be subject to immediate discharge
- Have the employee sign it (or a witness in the employee's place), and give the employee a copy

Final Straw?

- If the circumstances allow, consider asking the employee to explain the final incident in his or her own words and handwriting on a blank piece of paper
- This allows both sides one last opportunity to stave off a final work separation
- If the employee supplies what amounts to a written admission of misconduct, that would be relevant in any response to an unemployment claim
- TWC always drills down until the real final incident is revealed
- “Accumulation of problems” never works

What Does An Employer Need to Show?

- Voluntary work separation
 - Show how a reasonable employee would not have quit for such a reason
- Involuntary work separation
 - Show that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge, and
 - That the claimant either knew or should have known that discharge could occur for such a reason.
- Evidence needed: documentation of problems, and firsthand testimony from eyewitnesses

Poor Performance Cases

- Inability and incompetence are not misconduct
- Failing to do one's best *is* misconduct
- Best argument for claimant: "I tried my best – it just wasn't good enough."
- Best strategies for employer: documentation, firsthand testimony, past satisfactory performance, claimant passed up training opportunities, work was too simple to mess up



Poor Performance Cases 2

- Employer has to show how the poor performance was within the claimant's power to control
- Too many breaks / breaks too long
- Excessive visiting and other time-wasting with coworkers
- Excessive personal phone calls
- Too much Internet surfing
- Failing to double-check the work for negligent or avoidable mistakes
- Not enough time devoted to job because of avoidable absences or tardiness

How to Handle a Poor Attitude Case

- Don't start off accusing the claimant of having a "bad attitude".
- Be specific about behavior or conduct that violated a rule or interfered with the work of others.
- Document the warnings that were given.
- Present firsthand testimony from those affected.
- Let the hearing officer independently arrive at the conclusion that the claimant had a bad attitude.

Advanced Appeal Tribunal Strategies

- When sending documents to other party, use registered mail w/ return receipt – even better: personal courier with receipt describing delivery attempts
- Refer to documentation packet at start of hearing – ensure the hearing officer received it – offer to fax immediately if not
- Have list of witnesses and contact info
- Tell hearing officer at start of hearing about all witnesses and have them ready to go

Advanced AT Strategies 2

- Be organized and brief
- Hearing officers appreciate organization and brevity!
- Listen for verbal cues indicating when the hearing officer is ready to move on
- Be ready to signal your witnesses when it's time to stop talking

Advanced AT Strategies 3

- Agree beforehand on a way to communicate during the testimony – notes, hand gestures, and so on
- It's best not to get caught talking or whispering to your witnesses during the hearing

Advanced AT Strategies 4

- When given the chance to cross-examine, announce that you “just have a very few brief questions”, and keep that promise
- Try to signal your witness to stop talking once he or she gives the answer
- Avoid redundancy - note questions from the hearing officer and don't ask them yourself

Advanced AT Strategies 5

- If the claimant drops an unanticipated bombshell that would require a response from an unavailable witness, note that fact for the hearing officer and request a continuance
- If continuance is denied, make a brief but clear objection for the record
- That objection may help justify a rehearing at the higher appeal level

Advanced AT Strategies 6

- Need to get an arcane point of law across w/o irritating the hearing officer? Use direct examination of client/witness to get black-letter legal points into the record and be prepared to cite chapter and verse if the hearing officer asks for a cite.

Advanced Higher-Level Appeal Strategies

- Be brief and to the point
- Supply Commission with roadmap to decision in your favor
- “The AT decision was wrong for the following reasons” – reasons in bullet points
- Refer to precedent cases if any are on point
- Ask for rehearing if relevant, and give a compelling reason why one is needed
- In really compelling cases, let Commissioner’s or board / panel member’s office know about the case – don’t overdo!

ADA Issues in Unemployment Claims

- Violation of ADA can give good cause to quit, or supply an excuse for misconduct
 - Quit due to failure to reasonably accommodate
 - No misconduct in failing to answer a medical question barred by the ADA
- Medical work separation issues
 - Disqualification may be avoided
 - However, claimant must still be medically able to work

Workers' Compensation and Unemployment Claims

- Pursuing a valid workers' comp claim is not misconduct (a fraudulent WC claim could be misconduct)
- Possible misconduct if the claimant was responsible for an avoidable safety violation
- Medical work separation issues
- Claimant must be medically able to work
- Claimant cannot draw both workers' comp and unemployment benefits at the same time (small exception for permanent, partial disability)

EEOC Issues in Unemployment Claims

- Filing an EEOC claim is not misconduct
- Helping a coworker deal with workplace discrimination is not misconduct
- Employment discrimination can constitute good work-related cause to quit

Harassment of Others

- Misconduct, but eyewitnesses are needed - otherwise, the claimant may come off looking innocent
 - Statement from victim(s)
 - Statements from coworkers
 - Copy of harassment policy

Failing to Do the Work Safely or According to Training

- In addition to policy and firsthand testimony, document the safety rules or what the training provides for
- If violation of OSHA rules was involved, be specific about which rule was violated



Impact of NLRA on Unemployment Claims

- NLRA issue with salary confidentiality policies
 - Employer can't prohibit wage discussions between employees regarding their own wages
 - Employer can prohibit improper access of confidential wage information, including inducing others to allow such improper access
 - Employer also doesn't have to allow such discussions during work time, but should be consistent
- Social media policies – very tricky under recent NLRB rulings

Improper Wage Payments Can Be Good Cause to Quit and File a UI Claim

- Failure to pay minimum wage
- Failure to properly track all time worked
- Failure to pay overtime
 - Improperly classifying non-exempt employees as exempt in order to save on overtime pay
 - Allowing employees to work “off the clock” - never allowed, even if employee “agrees”
- Failure to pay according to the wage agreement that was in effect when the work was performed
- Failure to pay fringe benefits that are promised in writing

Other Wage Issues in Unemployment Claims

- Failure to submit timesheets properly is usually not cause to delay wages, but can be misconduct
- Frequent late wage payments can be good cause to quit
- The same applies to bounced / NSF paychecks
- The same applies to paychecks to which a “stop payment” order is applied, or to direct wage deposits that are reversed at the instruction of the company
- Pay reduction cases are an entire category by themselves

Reductions in Hours or Pay

- Hours – 20% or more reduction = good cause to quit and file an unemployment claim (25% with misconduct-related cuts in hours)
- Pay – same 20% rule applies
- Both – 20% rule applied to the bottom-line pay outcome
- Cuts in benefits with monetary value can be combined with other cuts to see whether the total decrease in compensation is 20% or more
- Partial unemployment benefits – if weekly pay goes below 125% of the weekly benefit amount, claimant can receive the difference in partial unemployment benefits

Other Wage-Related Claim Issues

- A claimant's wage claim could be used as evidence in an unemployment claim fraud proceeding
- A claimant's request to add wage credits for an unemployment claim could also be evidence of unreported work and earnings for a prior claim
- Employers who lose wage claim cases will find themselves owing back UI taxes, interest, and penalties for unreported wages and unpaid unemployment taxes

PART 2

HOW TO WIN A UI CLAIM

- Difficult to win after job separation
- Must take action during employment relationship
- Depends on type work separation

IF CLAIMANT QUIT

- Address any legitimate complaints
- Investigate as necessary
- Take all reasonable and appropriate steps to remedy the problem
- “If it’s not written down, it didn’t happen.”

CASE STUDY #1

- Employer = janitorial company
- Claimant = janitor

CASE STUDY #1



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CASE STUDY #2

- Employer = machine shop
- Claimant = machine operator

CASE STUDY #2



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CASE STUDY #3

- Employer = large medical practice
- Claimant = facility operations

CASE STUDY #3

You fucking bitch. I told you to keep your fat ass mouth shut about me leaving and you just couldn't do it could you?
You are the biggest lying, manipulating piece of shit that has ever walked this earth.

CASE STUDY #3

I guess you know why you aren't getting fired? Or did Dr [REDACTED] not tell you?

He knows you have been fired from 2 jobs and that he doesn't think you can find another job because you have no skills.

His words exactly "you have no landing pad".

CASE STUDY #3

The saddest part of all - your poor momma has to see what a rotten conniving piece of shit you are. I bet you make her real proud.

IF CLAIMANT FIRED

- Clear policies in place
- Claimant was aware of policies
- Employees treated consistently
- Warnings resulted from violations
- Expectations and consequences
- Claimant **knew** job in jeopardy



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NOT INCIDENTS OF MISCONDUCT

- Inability
- Business needs
- Unreasonable employer request

CASE STUDY #4

- Employer = small medical practice
- Claimant = medical assistant

CASE STUDY #4



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CASE STUDY #5

- Employer = auto parts retailer
- Claimant = delivery driver

CASE STUDY #5



CASE STUDY #6

- Employer = auto dealership
- Claimant = internet assistant

CASE STUDY #6



HOW NOT TO LOSE

- Respond timely to notice of claim
- Provide an adequate response
- Participate in claims examiners' investigation
- Appeal initial determination timely

TIMELINESS

- Failure to be timely can be deadly to case
- Keep records of timely submission/appeal
- Timely appeal = jurisdictional issue

TIMELINESS



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AT HEARING

- Show up to hearing on correct date/time
- Remember the burden of proof
- Provide firsthand evidence
- Provide your best evidence

BURDEN OF PROOF

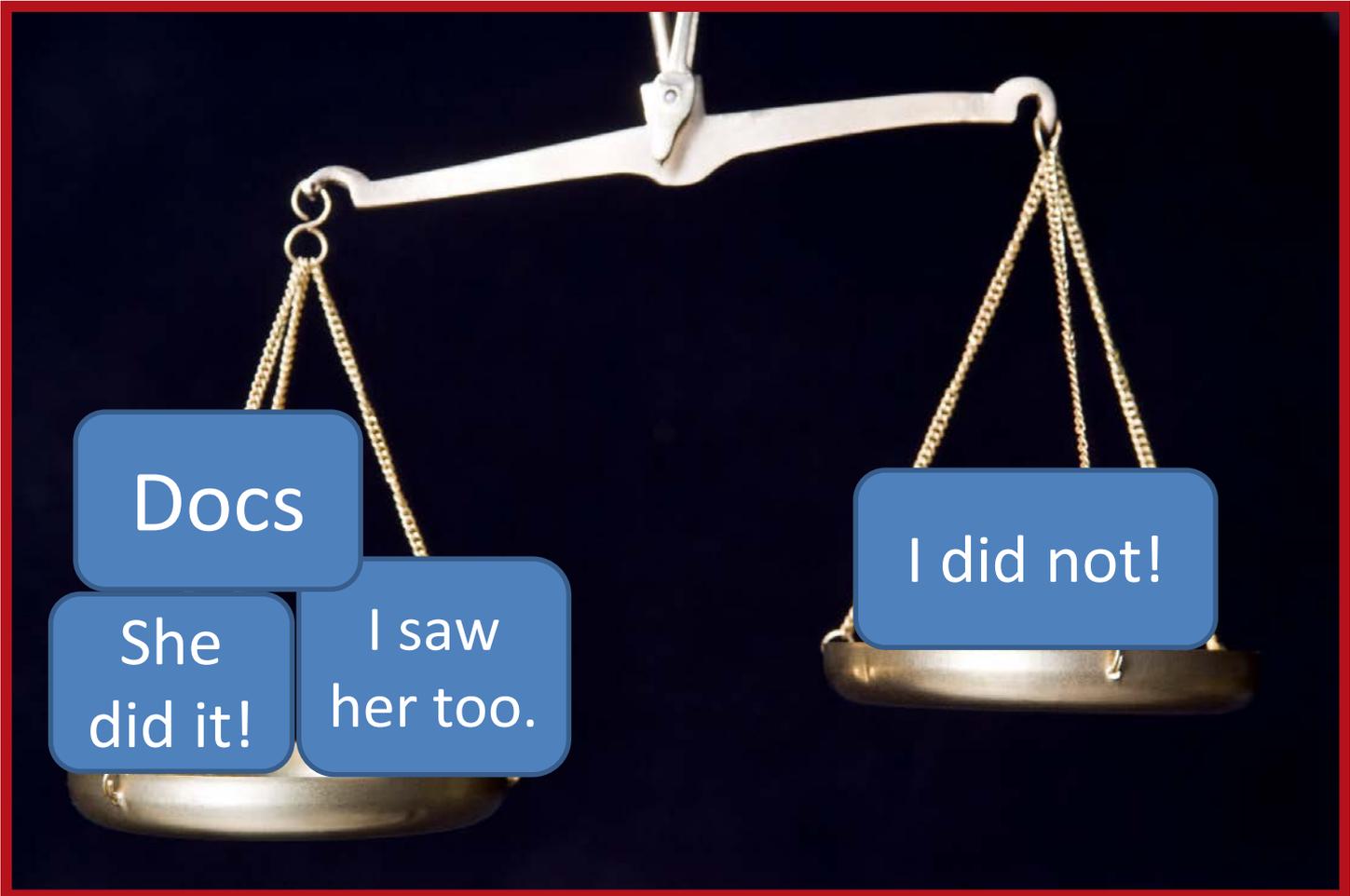
- Burden on party initiating job separation
- Preponderance of the evidence
- 51% to 49%
- “More likely than not”

BURDEN OF PROOF



BURDEN OF PROOF





FIRSTHAND EVIDENCE

- Firsthand witnesses
 - who directly saw or heard what happened
 - present at final Incident
- Secondhand hearsay
 - Written statements
 - Second-hand accounts
 - **not** given the same weight

FIRSTHAND EVIDENCE

**Firsthand
testimony**



**2ND hand
hearsay**

CASE STUDY #7

- Employer = engineering firm
- Claimant = engineer

CASE STUDY #7

“So you’re telling me that I have to keep an employee who’s talking bad about me to a client?”

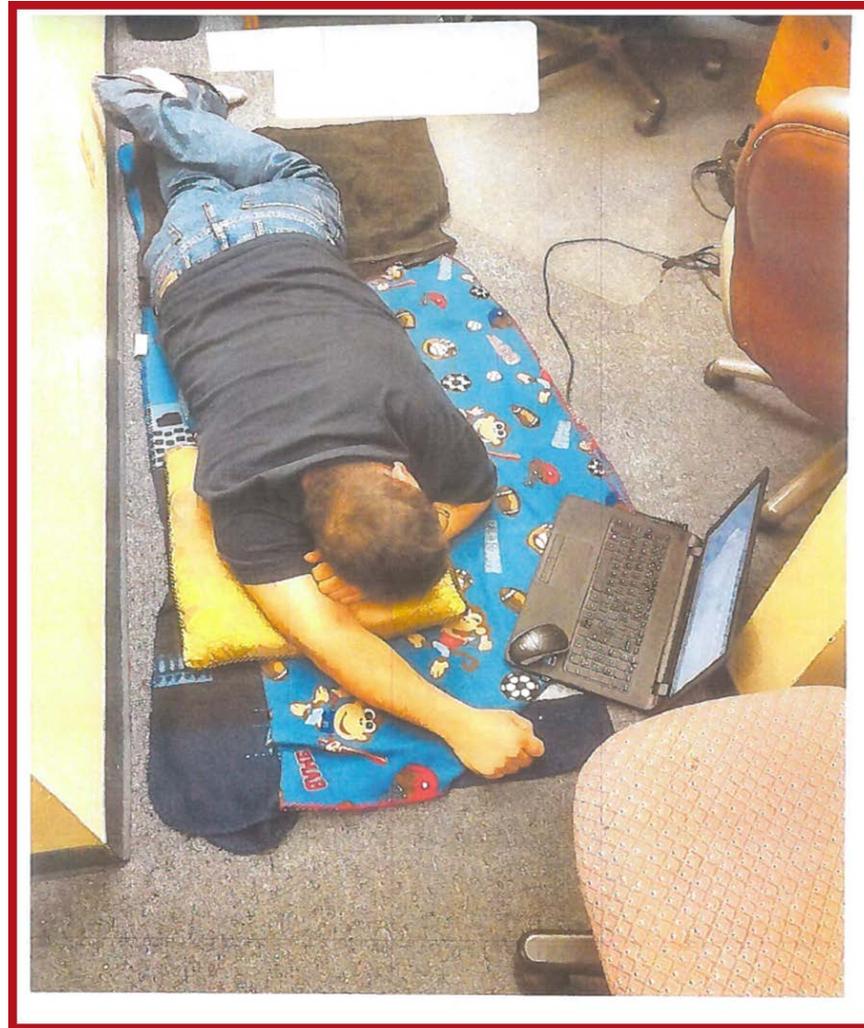
BEST EVIDENCE

- Remember the 3 Little Pigs
- Count on only one hearing
- Provide most credible/persuasive case
- Tell your story

CASE STUDY #8

- Employer = tow truck/wrecker service
- Claimant = dispatcher

CASE STUDY #8



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WHAT IF CLAIMANT HAS A LAWYER?

- Signifies much more serious case
- EEOC: discrimination, hostile work environment
- Retaliation: Workers Comp, complaint filed
- NLRA violation
- FMLA violation/interference
- FLSA or pay violations
- **Attorneys' fees**

LAWYER AT HEARING. WHY??

- Free discovery/free deposition
- List of potential witnesses
- Witness statements under oath
- Snapshot of the case
- Inconsistencies/discrepancies in statements
- Record can be used against employer

EMPLOYER STRATEGIES

- Depends on type of claim
- If quit case: Claimant has burden
 - Opportunity for snapshot of case
 - Same potential benefits
- If discharge case: Employer has burden
 - Does employer show all, some, or no cards?
 - Weigh UI claim consequences vs litigation

CASE STUDY #9

- Employer = private cable provider
- Claimant = office staff member

EMPLOYER'S CHOICE

- Contact employment law attorney if EEOC complaint, demand letter, or lawsuit against the employer
- Decisions made during UI claims and appeals process can benefit or harm employer's chances of prevailing on more serious and costly cases - evaluate carefully
- Don't be "pennywise and pound foolish"



Penny wise, pound foolish.



Thanks for your attendance
and
Good Luck!

Remember the toll-free number:
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