

Texas Workforce Commission Hearings: Winning the Battle But Losing the War

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Why?

- Discrimination and retaliation charges on the rise
- Unemployment administrative hearing—testimony is sworn record (opportunity for direct and cross examination, all would be admissible in subsequent suit)
- TWC or EEOC process—position papers, affidavits, documents, statements by management set the stage for any subsequent suit

How?

- Make strategic decision early on
- Be prepared, be consistent



EEOC Discrimination Charge Filings Nationwide

Up 15.2% compared with Fiscal 2007

- Discrimination and retaliation charges on the rise

Basis of Charge Filing 2008

Race	36%
Retaliation	34%
Sex or gender	30%
Age	26%
Disability	20%
National origin	11%
Religion	3.5%
Equal Pay Act	1%

Texas Workforce Commission—Unemployment Administrative Appeal Hearings



- Telephonic responses to TWC now become part of the record
- Records maintained by employer
 - Employee’s personnel, HR policies, pay records
- Records supporting decision
 - Statements by other employees, investigatory records, other employee’s personnel files
- Sworn testimony
 - Opportunity for direct and cross examination
 - Employee may have obtained an attorney
 - Witnesses may be placed under “The Rule” by opposing party or Hearing Officer
 - Cannot rely on Hearing Officer to keep issues narrow during questioning

Appealing an Application for Unemployment Insurance

- www.texas.workforce.org
- Prepare for an appeal
- The Appeals Policy and Precedent Manual-the rulings in precedent cases selected by the Commission to guide future decisions

Was there “Misconduct”?

- Misconduct: Table of contents and sections 5 - 600. This chapter details Commission precedents on claimants' eligibility for unemployment benefits in cases involving an allegation of employee misconduct.

Misconduct

Section 201.012 of the Texas Unemployment Compensation Act states, “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 orderly work and the safety of employees. The term ‘misconduct’ does not include an act in response to an unconscionable act of an employer or superior.”

TWC Appeals Policy and Precedent Manual: Misconduct

- **Tardiness** – failure to follow progressive discipline supported finding that tardiness was not misconduct
- **Performance** – employee given 30 days to improve performance but discharged prior to expiration of 30 days because employer determined employee was not improving held to be misconduct



Was There a “Voluntary Leaving”?

- Voluntary Leaving: Sections 5 through 515.95. This chapter details Commission precedents on claimant's eligibility for unemployment benefits in cases in which there is an allegation that a claimant has voluntarily left available work.

Voluntarily Leaving Work

- Section 207.045 of the Texas Unemployment Compensation Act codified in the Texas Labor Code—sets out a disqualification if employee leaves without good cause connected with work
- Excludes: verified illness of the individual or minor child, injury, disability, pregnancy, 207.046 provisions, relocation in certain instances

Labor Code Section 207.046

Involuntary Separation

- An individual is qualified for benefits if:
 - The work-related reason for the employee's separation from employment was urgent, compelling, and necessary so as to make the separation involuntary
 - The employee leaves to protect from family violence or stalking
 - The employee leaves to care for a terminally ill spouse if no reasonable, alternative care available.



TWC Appeals Policy and Precedent Manual: Voluntary Leaving

- **Change in hours or pay structure**—employer changed policy on overtime and compensatory time and employee worked for a duration without complaint. Not good cause for quitting.
- **Change in terms of employment**—originally hired to work a forty-hour week. Later, the employer wanted to double the number of patients for whom the claimant was to be responsible but she declined to take on the added responsibility. Employer reduced hours by 50% and she was placed on an as-needed basis. When she was told that she would have to accept the reduced work schedule or quit, she quit. Amounted to such a substantial change in the claimant's hiring agreement as to have provided her with good cause connected with the work for her quitting.



- Take a step back and evaluate—what may be a winner at an unemployment hearing may be a loser for later litigation strategy
- Be prepared for the long haul—learn the entire story from all involved, pull all employee files, prepare your witnesses—sworn testimony, know the documents (personnel file, emails, any supporting work documents)



I long to accomplish [] great and noble tasks, but it is my chief duty to accomplish humble tasks as though they were great and noble. The world is moved along, not only by the mighty shoves of its heroes, but also by the aggregate of the tiny pushes of each honest worker.

--HELEN KELLER

