## HANDLING UNEMPLOYMENT CLAIMS

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**CHAPTER 7** 

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Kerry O'Brien has been practicing law since 2002 and is a graduate of the University of Texas School of Law. He is a former hearing officer for the Texas Workforce Commission, where he handled approximately 800 hearings on issues related to unemployment benefits. Since 2008, he has been an advocate for employees in his own practice, the O'Brien Law Firm. As part of that practice, he has represented claimants in hundreds of unemployment hearings before the TWC.

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This paper is intended to provide an overview of the unemployment appeal process in Texas, and to be a practical guide on handling these appeals as an attorney.

#### I. The Texas Workforce Commission

The Texas Workforce Commission ("TWC") administers both state and federal unemployment benefits Texas to unemployment Federal claimants. unemployment benefits are authorized by the United States Congress on an emergency basis and can extend the benefits available to an unemployment claimant. The Executive Director of the TWC is appointed by the Texas governor.

#### II. Initial Claim for Benefits

To begin the process of receiving benefits, the claimant files an initial claim with the Texas Workforce Commission. Initial claims are backdated to the initial Sunday of the week in which the claim is filed. The claimant must be separated from employment at the time of the benefits request. The ending of employment is called an employment "separation" by the TWC, since the employment can end by either a termination by the company or a quit by the employee. A temporary layoff or temporary reduction in hours may still qualify the employee for benefits. A suspension with pay will not be considered a separation from employment. A suspension without pay constitutes an employment separation. If the suspension without pay lasts more than 3 days, it will be considered a termination. If the suspension without pay is 3 days or less. and the employee refuses to return to work after the 3-day suspension is complete, it is treated as a quit rather than a termination. Appeal No. 96-012206-10-102596, MC 135.45(2), Appeals Policy & Precedent Manual.

After the claimant files the initial claim, the TWC will send a Notice of Initial Claim to the claimant's Last Employing Unit ("LEU"). Texas Labor Code § 208.002(b). The LEU will have 14 days to respond to the

<sup>1</sup> It can confuse attorneys to see that their client's unemployment initial claim date precedes their termination from employment. This is because of backdating.

TWC, and describe why the claimant was separated from employment. If the LEU fails to file a timely response, the TWC examiner will still make a decision based on the available information. Furthermore, the LEU will not be a "party of interest" to the claim, meaning the LEU may participate in an appeal but has no appeal rights of its own. However, an LEU's failure to respond to the claim does not automatically mean that the claimant will receive entitlement to benefits. A claimant can provide information that self-disqualifies the claimant from benefits.<sup>2</sup>

The LEU is simply the last person or entity for whom the claimant provided services for compensation before the initial claim. For example, if an employee works for a company for 20 years, is laid off, works a one-week job for his sister's business to fill in for an absent employee, and then files for unemployment benefits, the TWC will want to know why he was separated from employment from his sister's company in order to determine entitlement to benefits. His sister's company is the LEU before the initial claim is filed. During an Appeals Tribunal hearing, one of the first things the hearing officer determines is if the proper LEU has been named. The hearing officer will usually ask the claimant as an initial matter whether the claimant has performed any work for anyone else between the separation from employment and the filing of the initial claim.

# III. Determination on Payment of Unemployment Benefits

Once the TWC examiner has obtained both sides of the story (presuming the parties respond in time), he or she will issue an initial Determination on Payment of Unemployment Benefits. (A sample is attached as Exhibit 1.) The examiner's determination is final unless the claimant or the LEU files an appeal by the 14<sup>th</sup> day following the date the Determination is mailed.<sup>3</sup> Texas Labor Code § 212.053. While

<sup>&</sup>lt;sup>2</sup> It is common for a claimant to believe that their former employer "denied my benefits." In fact, only the TWC can make that determination, and an employer can only provide information that could lead to a denial.

<sup>&</sup>lt;sup>3</sup> The examiner can file an appeal, which is rare. The examiner can also issue a redetermination, perhaps to correct an error or respond

the Determination will state the actual date the appeal is due, keep in mind that the 14 days runs from the date of mailing and not the date of receipt.

The Determination concerning the initial decision to grant or deny entitlement to benefits will state in general terms the basis for the decision. It will say either "we can pay you benefits" or "we cannot pay you benefits." Different language maybe used for special issues, such as cases of alleged fraud or failure to report to a TWC office as instructed. The language used to describe the reason not to pay benefits can frustrate claimants because it will seem to have no connection to the actual facts of their employment separation. It is simply due to the fact that the TWC will describe the reason using broad, boilerplate terminology.

The Determination will also identify the specific legal entity with which the claimant was employed. This can be helpful if you are handling an employment case on behalf of the claimant and were not able to otherwise identify the actual legal entity that employed your client. When the claimant works for a large company with multiple subsidiaries, often with similar names, this can be extremely helpful.

### IV. Timely Appeals<sup>4</sup>

The party that received an adverse Determination has until the 14<sup>th</sup> day following the date of the Determination to appeal it. Texas Labor Code § 212.053. The 14-day deadline is extended one working day following a deadline which falls on a weekend, an official state holiday, a state holiday for which minimal staffing is required, or a federal holiday. 40 T.A.C. § 815.32(a). This is jurisdictional - the TWC will not have the authority to hear the appeal if the deadline is not met.

There is nothing special that must be stated in the appeal request – anything that identifies the appealing party and expresses dissatisfaction with the Determination or requests an appeal will normally suffice. With that said, Exhibit 2 is a sample letter that my office uses to appeal a Determination for a new unemployment client. (The broad language regarding "all determinations" is intended to cover potential determination letters that the claimant may not have received or may not have brought to my attention.)

If a party is untimely on their appeal, there are very limited circumstances in which they can still have their appeal heard. In my personal experience, there have been only two circumstances where an untimely appeal was heard.

First, if the party did not actually receive a copy of the Determination, they may be able to still have their appeal heard. The TWC does not send out its notices by verifiable means. However, a TWC document is presumed to have been received if the TWC records demonstrate that it was mailed to the correct address of record. The party can only overcome this presumption by showing (1) tangible evidence of nondelivery, such as the document being returned to the TWC by the United States Postal Service; or (2) credible and persuasive evidence is submitted to the TWC to establish nondelivery, delayed delivery, or misdelivery of the document. 40 T.A.C. § 815.32(b). If the party is alleging non-receipt of the mailing, the hearing officer will normally probe the mail receipt system of the party. For an employer, the hearing officer will usually ask about the chain-ofcustody of incoming mail. For claimants, the hearing officer will usually try to determine if anyone else actually obtains the claimant's mail, or whether the claimant has been having any problems receiving mail. A party that is facing a timeliness issue should definitely consult a knowledgeable unemployment attorney on the matter. Any evidence or suggestion that the party did receive the document will normally kill the party's chance of overcoming untimeliness issue.

The second is when a party alleges that a TWC representative gave the party wrong information. Timeliness sanctions shall not apply when a TWC representative or a

to late-received information, which will reset the appeal clock. Texas Labor Code § 212.054.

<sup>&</sup>lt;sup>4</sup> The various rules for appealing adverse unemployment decisions are found within Texas Labor Code Chapter 212, "Dispute Resolution" as well as 40 T.A.C. Chapter 815.

representative of a Board or an agent state representative has given misleading information on appeal rights to a party, if the party: (A) specifically establishes how the party was misled; or (B) specifically establishes what the party was told that was misleading and, if possible, by whom the party was misled. 40 T.A.C. § 815.32(i)(7). of **TWC** With hundreds claims representatives around the state, one of them will, from time-to-time, give incorrect or misleading information to an unwitting claimant. A full list of the various rules on timeliness, including rules on when an appeal is perfected, can be found at 40 T.A.C. § 815.32. (These rules will also apply to an appeal of a decision of the Appeals Tribunal to Commission Appeals, discussed in detail later in this paper.)

Typical reasons that will normally hurt the party on a timeliness issue:

#### Employer:

- (1) "Our receptionist forwarded the TWC letter to the wrong department."
- (2) "It was received by our unemployment representative but they failed to forward it to us."
- (3) "We changed our suite number but forgot to change our address with the TWC."

#### Claimant:

- (1) "I never got it, but my mom picks up my mail for me and she has misplaced my mail in the past."
- (2) "I got one Determination that was for me and one against, so because I got one in my favor, I didn't think I had to appeal anything."
- (3) "I moved and forgot to tell the TWC about my new address."
- (4) "I'm sorry, just really sorry I was late. I was really busy."

There is no good cause exception to the timeliness rules. 40 TAC § 815.32(i)(8). However, mailing of notice to a party representative, whether or not an attorney, is required to bind parties to timeliness rules. 40 TAC § 815.32(c)(4).

#### V. The Appeals Tribunal

The Appeals Tribunal is charged with hearing appeals of Determinations. The Appeals Tribunal hearing officers handle all unemployment hearings by telephone (except those where a party or witness is hearing impaired). There are currently around 111 Appeals Tribunal hearing officers around the state. The manner of performing the job is governed by the Appeal Hearing Officer Handbook, which is published online.<sup>5</sup>

While some of the older hearing officers are not attorneys, I believe that it is now required that new hires be licensed attorneys. However, there are a number of older hearing officers that are not attorneys. A typical separation hearing (without additional substantive issues) will normally be set for one hour, to be continued to another date and time if the hearing doesn't finish within the hour. A typical schedule for a hearing officer may be 6 or 7 hearings on 4 days of the week, with one day (often Friday) set aside for the purpose of catching up on writing decisions. As you can see, the hearing officers have a lot of decisions to prepare and issue, so they generally don't want to get too caught up in or delayed by one single hearing. That can sometimes explain their typically terse demeanor, as they try to control parties over a telephone with nothing more than their voice and move a hearing along.

### VI. Separation Hearings

The vast majority of unemployment appeal hearings concern the reason for the claimant's separation from their last work. An individual is disqualified for benefits if the individual was discharged for misconduct connected with the individual's last work, or if the individual left their last work without good cause connected with the work. Texas Labor Code § 207.044(a) and § 207.045(a).

If disqualified, the claimant's disqualification will remain in place until the claimant has worked for six weeks or has earned wages equal to six times the individual's benefit amount. Texas Labor Code § 207.044(b) and § 207.045(b). That means that even if the person is disqualified for benefits, if they get

<sup>&</sup>lt;sup>5</sup> http://www.twc.state.tx.us/appeal-hearing-officer-handbook-table-contents. Or just Google it.

a temporary job where they are working at least 30 hours a week for 6 weeks, and get laid off, they can requalify for benefits. The six weeks of work essentially "clears" the prior disqualification and the 6 weeks need not be consecutive. Or, if their weekly benefit amount would be \$400, for example, if they earn \$2,400 while disqualified, they can requalify for benefits. Obviously, if they are earning regular income at that point, they won't need unemployment. However, I have helped disqualified clients piece together wages from various odd jobs and temp jobs until they could show the TWC pay stubs that equal at least six times the weekly benefit amount. When that threshold is met, the TWC will want to know why they were separated from their last work. At that point, it would be one of those temp jobs.

At the same time, as you see, it might not be in a claimant's best interest to file for benefits immediately after quitting or being fired, if it appears likely they will be disqualified based on that employment separation. Sometimes, it is better for the claimant to take at least a temporary job. After the temporary job ends, it will normally be considered a "lay off." If the claimant applies at that time instead, the TWC will only look at the lay off from the temp job, making it much more likely that they will qualify for benefits. It of course would require the advice of a knowledgeable unemployment attorney to evaluate that decision.

"Misconduct" means mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees. Texas Labor Code § 201.012(a). The term "misconduct" does not include an act in response to an unconscionable act of an employer or superior. Texas Labor Code § 201.012(b). A discharge for misconduct is considered an "involuntary" work separation because it is initiated by the employer. The employer therefore bears the burden of proving that the reason for the work separation qualifies as work-connected misconduct. (Technically, neither

employer nor the claimant bears a "burden or proof" as understood by lawyers. According to TWC Appeal Hearing Officer Handbook Section 414, the Appeals Tribunal hearing officer bears the "procedural burden of proof" to find facts that will provide adequate support for the hearing officer's decision.)

A Voluntary Quit is initiated by the employee. Whether a voluntary quit is with or without good cause, or whether the claimant was discharged for misconduct, depends heavily on the precedents in the TWC Appeals Policy and Precedent Manual.

# VII. The Appeals Policy and Precedent Manual

The Appeals Policy Precedent Manual is a collection of prior TWC Commission Appeals decisions that have been adopted as precedent by the TWC and summarized into a paragraph. Each hearing officer has a binder full of hundreds of precedent decisions that they use for guidance in their decision making, akin to the principle of *stare decisis*. The purpose of the Precedent Manual, according to the TWC, is to "promote consistency of appeal decisions." Per the Hearing Officer's Handbook, a hearing officer is encouraged but not required to cite a precedent in their decision.

The Precedent Manual is divided into 10 sections:

- 1. Able and Available.
- 2. Chargeback.
- 3. Labor Dispute.
- 4. Miscellaneous.
- 5. Misconduct.
- 6. Procedure.
- 7. Suitable Work.
- 8. Total and Partial Unemployment.
- 9. Voluntary Leaving.
- 10. Appendix.<sup>7</sup>

<sup>6</sup> The examiner also uses the Precedent Manual for guidance, but they do not cite or refer to precedent cases in the initial Determination.

<sup>&</sup>lt;sup>7</sup> The Appendix contains a list of court cases that the TWC considers to be significant, with summaries of the cases' holdings. However, Appeals Tribunal Hearing Officers rarely cite appellate court decisions, relying almost solely on the Appeals Policy & Precedent Manual for guidance.

As you can see, whether the claimant quit or was terminated will change the hearing officer's analysis entirely and can be an extremely important issue in contention in certain fact situations. The TWC recognizes "constructive discharge." However, in the context of state and federal employment rights violations, a constructive discharge is employer makes when the working conditions so intolerable that a reasonable employee would feel compelled to resign. In the context of unemployment, that situation would be deemed a quit, and the question would be whether the claimant had good cause to quit. A "constructive discharge" in the language of the TWC occurs when the employer presents an ultimatum of "quit, or be fired." In that case, the separation will be considered a termination, and the question will be whether the claimant engaged in misconduct to cause the termination.

The Voluntary Leaving and Misconduct chapters of the Precedent Manual are divided into various sections for the various scenarios under which someone might quit or be fired. Certain general principles regarding "misconduct" or "good cause to quit" have developed from the precedent cases, such as the following:

- If a claimant quits due to dissatisfaction with the working conditions, they must give the employer notice of the problem and an opportunity to correct it before quitting.
- If a claimant continues working under a certain working condition for an extended period of time, they may be deemed to have accepted that working condition.
- If a meaningful amount of time passes between the final incident leading to a termination and the termination itself, the TWC may find that the claimant was terminated for a reason that is not misconduct, in the absence of the employer providing a credible explanation for the delay.
- If a claimant was working to the best of their ability but was unable to perform to the satisfaction of the employer, the

termination is for a reason other than misconduct. However, if the work is simple enough that a worker applying reasonably diligent effort to perform it should be able to perform it, the failure to perform may be deemed misconduct.

• If a claimant previously demonstrated an ability to perform, and that performance has declined, it is presumed to be misconduct in the absence of a reasonable explanation for the decline in performance (e.g. salesperson's accounts cut in half).

# VIII. The Hearing Notice, File Documents and Appeals Tribunal Hearing Procedure

Approximately 15 days before the hearing date,8 the TWC will send the parties (and their representatives, if the TWC has notice of representation), the hearing notice and case file. The hearing notice will state the date and time of the hearing as well as identify the hearing officer assigned to that hearing. (A typical hearing notice is attached as Exhibit 3.) It will also identify whether the employer is a party-of-interest ("PI") or not a party-of-interest ("NPI"). Page 3-A of the packet will state the issues that will be decided in that hearing. A party must have proper notice of any issues that will be addressed, with the exception of chargeback or last employing unit issues. The pages in the hearing packet for the first setting are numbered #-A. Subsequent hearing setting packets will be numbers #-B (2<sup>nd</sup> setting), #-C (3<sup>rd</sup> setting) and so forth.

Normally beginning on Page 9-A of the hearing packet will be the fact finding notes of the TWC examiner that made the initial determination. (A sample is attached as Exhibit 4.) Sometimes the claimant responds via the Internet, in which case the claimant's responses are set out in full and should be accurate. However, most of the time, the TWC examiner has a telephone conversation with the claimant as well as the employer's representative or key individuals. In that case, the TWC examiner will take down notes from the conversation that run the

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<sup>&</sup>lt;sup>8</sup> I once took 30 hearing notices and determined the number of days between the date of mailing and the date of the scheduled hearing. The average was 15 days.

gamut between a pretty accurate transcription and an incoherent mess. However, the hearing officers understand that the examiner's notes from the telephone conversation are not a transcript. Therefore, while the hearing officers will tend to use the notes as a way to formulate specific questions or challenge testimony, the hearing officers tend not to use a TWC examiner's telephone conversation notes as evidence in and of themselves (even though they customarily admit the notes into evidence). However, if the hearing officer asks a claimant "why did you tell the examiner X" when the claimant actually told the examiner "Y," the claimant should simply tell the hearing officer that the note is inaccurate, and that the claimant actually told the examiner "Y." In such cases, the hearing officer essentially has no choice but accept the claimant's explanation that the note is inaccurate.

In the hearing packet, the TWC also includes any documents received from the parties prior to the TWC preparing the hearing packet. If a party sent the examiner a document and it is not in the hearing packet (or has another document to add), the party should fax or mail it to the hearing officer directly, and send a copy to the other party.

Everyone participating in the hearing is required to register for the hearing in the 30minute window before the hearing is scheduled to begin. The hearing officer calls all of the registered individuals at the scheduled hearing time. An attorney is not required to notify the TWC or opposing party in advance of their participation, apart from registering for the hearing. Each party can have a "party representative" who may or may not be an attorney. The hearing officer will mention that "the Rule" can be invoked, and the Rule can be invaluable when multiple witnesses are involved. This is especially true for telephone hearings, as the hearing officer cannot see the body language of the witnesses. Therefore, a witness could otherwise mimic and therefore corroborate the testimony of another witness very easily if they are in the room to hear the other witness testify. Invoking the Rule has actually won cases in my experience. And, where you are representing the claimant, and

the employer has 4 former co-workers of the claimant on a conference call ready to testify, it can certainly calm the claimant's nerves by having those people sent out of the room. If I want to invoke the Rule, I usually do so when the hearing officer asks me "Do you have any questions about the procedures in this case?"

After swearing in the witnesses, the hearing officer will get background information on the claimant's employment, e.g. dates of employment, final pay rate, etc. Then, the hearing officer will get the details of the employment separation, beginning with the party that initiated the separation. That means that if the claimant was fired, the hearing officer will get the employer's side of the story first, and vice versa. After the hearing officer has asked his or her questions of a witness, the party representative for the witness can ask question to the witness. Then, the opposing party representative can cross-examine the witness.

Objections. The rules of evidence are not strictly enforced. The hearing officer will allow hearsay testimony and will give it the weight due, considering that the first-hand witness is not present for cross-examination. Hearing officers are charged by the Commission with keeping out irrelevant testimony and are normally proactive about disallowing irrelevant (and unfortunately sometimes relevant) questions. That can sometimes make it hard to engage in "discovery" on an underlying employment rights case if the questions are not useful for the hearing officer's specific decision making in the unemployment appeal. It depends on the hearing officer as well as your skill.

First-hand testimony is given a significant premium in Appeals Tribunal hearings. There is case precedent that essentially states that first-hand testimony must be accepted over hearsay testimony (including affidavits). (This is with the obvious caveat that the first-hand testimony cannot be internally contradictory.) So (using my standard "traffic light example"), if a live witness says that the traffic light was red, and

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<sup>&</sup>lt;sup>9</sup> PR 190.00: Appeal No. 21386-AT-65 (Affirmed by 656-CA-65). "Testimony under oath is more convincing than unsworn written statements or testimony based on hearsay."

the opposing party submits affidavits from three witnesses saying the light was green, all things being equal, the hearing officer must find that the light was red.

Documents must be offered into evidence and admitted to be considered by the hearing officer. While you must also provide a copy of any potential exhibits to the opposing party, there is no deadline on the exchange. However, recent changes to the fax distribution system for many hearing officers means that it takes longer for hearing officers to receive documents that are faxed to the central distribution fax number (currently 512-475-2150). Hearing officers are not permitted to accept documents by email. Some hearing officers work from home and have their own fax machine available at their workstation and can receive faxed documents on the fly.

The hearing officer does not announce a decision during the hearing. Instead, the hearing officer will prepare a written decision that is mailed out usually within 1-10 days following the closing of the hearing. Very few hearing officers allow the parties to make a closing statement. Occasionally, a hearing officer will allow it or even request it. Hearing officers are not required by due process considerations to allow closing statements.

The Appeals Tribunal hearings are recorded and the witnesses testify under oath. Therefore, the hearing can be useful for purposes of underlying litigation. You can request a copy of the hearing by sending an Records request open.records@twc.state.tx.us. TWC proceedings are confidential by law and therefore can only be requested by the party to the claim. Currently, TWC Open Records requires that an attorney making a request attach a letter of representation as verification of the attorney's representation. They will charge for the request, usually around \$20.00.

Attorneys often wonder whether they should suggest a precedent to the hearing officer during the hearing. As a former hearing officer, my opinion is "no." The hearing officers know the precedents. The better

approach is to know what precedents may apply in your hearing, and prepare your client's and witnesses' testimonies beforehand in a way that will make it most likely for the hearing officer to use the precedent case that favors your client.

# IX. Appealing the Appeals Tribunal decision

Decisions of the Appeals Tribunal are appealed to Commission Appeals. The appeal is due no later than the 14<sup>th</sup> day after the mailing date on the decision. Texas Labor Code § 212.104. Commission Appeals is a three-member appointed body with one member representing labor, one member representing employers and one member representing the public. Commission Appeals may:

- (1) on its own motion:
  - (A) affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in the case; or
  - (B) direct the taking of additional evidence; 12 or
- (2) permit any of the parties to the decision to initiate a further appeal before the commission.

In my experience, probably around 90% of appeals are affirmed simply because the vast majority of appellants disagree with the hearing officer's exercise of discretion in judging the credibility of witnesses and evidence.

Commission Appeals will issue a written decision. It is typical for the commissioner representing labor to "dissent" on an opinion that is in favor of the employer, or for the commissioner representing employers to "dissent" on an opinion that is in favor of the

<sup>&</sup>lt;sup>10</sup> In the statute, Commission Appeals is referred to as "the Commission." To avoid confusing the term "commission" with the agency itself, I use "Commission Appeals" throughout to refer to the appeals review body.

<sup>&</sup>lt;sup>11</sup> While historically the commissioners have not usually been licensed attorneys, Ruth R. Hughs, who was appointed by Gov. Abbott in 2015 to be the commissioner representing employers, is a licensed attorney.

<sup>&</sup>lt;sup>12</sup> This is called a "rehearing" and is usually scheduled with the Special Hearings department. The Special Hearings hearing officer is directed to obtain additional evidence on specific issues that Commission Appeals believes it needs to render a proper decision.

claimant. This is normally posturing for their constituencies, since in many cases, applying a proper substantial evidence review should easily result in all three commissioners agreeing to affirm a decision. They rarely author any actual dissenting opinion. Therefore, you should give very little stock to the fact that a commissioner "dissented" in an appeal involving your client.

# X. Request for Rehearing or Judicial Review

A decision of Commission Appeals becomes final 14 days after the date the decision is mailed unless before that date: (1) the commission by order reopens the appeal; or (2) a party to the appeal files a written motion for rehearing. Texas Labor Code § 212.153. Pursuant to 40 TAC § 815.17, a motion for rehearing shall not be granted unless each of the following three criteria is met:

- (A) there is an offering of new evidence, which was not presented at the appeal tribunal level;
- (B) there is a compelling reason why the evidence was not presented earlier; and
- (C) there is a specific explanation of how consideration of the evidence would change the outcome of the case.

A motion for rehearing can also be granted in these two circumstances:

- When a party of interest did not appear before the appeal tribunal, nevertheless won at that level, and then received an adverse ruling at the Commission level, the Commission may grant a rehearing to consider whether there was good cause for the nonappearance. If good cause is found, the rehearing shall address the merits of the case.
- When a solely jurisdictional or procedural problem is not detected or recognized until after the Commission decision has been issued, the Commission may take appropriate action to correct the problem at the motion for rehearing level.

Commission Appeals is required to deny a request for rehearing unless it can be shown there are substantial reasons for Commission Appeals to grant the rehearing.

A party aggrieved by a final decision of the Commission Appeals may obtain judicial review of the decision by bringing an action in a court of competent jurisdiction for review of the decision against commission on or after the date on which the decision is final, and not later than the 14<sup>th</sup> day after that date. Texas Labor Code § 212.201. Practically speaking, this means that the request for rehearing is made between the 1<sup>st</sup> day and 14<sup>th</sup> day following the date of the Commission Appeals decision. A suit for judicial review is filed between the 15th day and the 28th day following the date of the Commission Appeals decision. There is no requirement that a party exhaust a request for rehearing before filing for judicial review. Texas Labor Code § 212.203(b). Therefore, there are three options after receiving an adverse Commission Appeals decision:

- 1. Do nothing and let it become final after 14 days.
- 2. File a request for rehearing within 14 days. If (and usually when) that's denied, then file for judicial review between the 15<sup>th</sup> day and 28<sup>th</sup> day following the date of the rehearing denial letter.
- 3. Skip the request for rehearing file for judicial review between the 15<sup>th</sup> and 28<sup>th</sup> day following the date of the Commission Appeals decision.

Request for rehearings are rarely granted. As a practical matter, if the aggrieved party is considering filing for judicial review and they lack a proper basis to obtain a rehearing, it may be in their best interest to skip the request for rehearing altogether. Filing for the rehearing without a basis to do so can unnecessarily delay their right to file for judicial review by weeks or even months.

A judicial review must be filed in the county of the county of the claimant's residence. Texas Labor Code § 212.204. That's the case even if the employer is filing the judicial review, at least where the claimant is a Texas resident. If the claimant is not a resident of Texas, the judicial review can be filed in one of three places:

- Travis County;
- the Texas county in which the claimant's last employer has its principal place of business; or
- the county of the claimant's last residence in Texas.

Judicial review is by trial de novo based on the substantial evidence rule. Texas Labor Code § 212.202. "Substantial evidence" means that reasonable minds could have reached the same conclusion the agency reached, based on the evidence as a whole. Texas State Board of Dental Examiners v. Sizemore, 759 S.W.2d 114, 116 (Tex. 1988). The trial court rules on the evidence admitted at the trial de novo, not on the evidence presented at the TWC hearing. Id. The determination of whether the TWC's decision is supported by substantial evidence is a question of law. Dozier v. Texas Employment Commission, 41 S.W.3d 304, 308 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, no pet.). Therefore, there is no right to a trial by jury for TWC judicial reviews. All trials are to the bench. The TWC is represented by an attorney from the Taxation Division of the Office of the Attorney General.

The party seeking judicial review must make all other parties to the underlying proceeding defendants in the judicial review. Texas Labor Code § 212.201(b). The party seeking to set aside the agency's decision has the burden of proving that it is not supported by substantial evidence. Mercer v. Ross, 701 S.W.2d 830, 831 (Tex. 1986). The reviewing court may only set aside the TWC's decision if the decision was made without regard to the law or the facts and therefore was unreasonable, arbitrary, or capricious. Id. at 831. It is for the reviewing court to decide whether the evidence is such that reasonable minds could not have reached the conclusion the agency must have reached in order to justify its decision. Hernandez, 18 S.W.3d at 681.

The conclusion you should reach after reading about this process is that you want your client to win at the Appeals Tribunal level. If your client loses at the Appeals Tribunal, it is difficult to get the case reversed because both subsequent levels of

review are essentially on a substantial evidence review basis.

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1872-1 C26736

UI Support & Customer Service TEXAS WORKFORCE COMMISSION PO BOX 2211 MC ALLEN TX 78502-2211

## **EXHIBIT 1**

320416210020900101

## DETERMINATION ON PAYMENT OF UNEMPLOYMENT BENEFITS Date Mailed: June 12, 2015

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Social Security Number: Employer:

As:

Employer Account No: All dates are shown in month-day-year order.

### **Decision**

Issue: Separation from Work

Decision: We cannot pay you benefits.

**Reason for Decision:** Our investigation found your employer fired you for inappropriate conduct on the job. This is considered misconduct connected with the work.

Beginning Date of No Payment Period (Disqualification): 05-10-15

What you can do: You can request that we end this disqualification if you return to employment as defined in the Texas Unemployment Compensation Act after the beginning date above and:
(a) Work at least 30 hours a week for six weeks OR earn wages equal to six times your weekly benefit amount; AND

(b) provide TWC with proof of your work or earnings and request that we end the disqualification.

You can fulfill the work or earnings requirements while you continue to work part time. However, if you are no longer working, you must have a qualifying separation from your last job.

Law Reference: Section 207.044 and Subchapter D, Section 201 of the Texas Unemployment Compensation Act.

### Determination of Potential Chargeback for the Employer

There will be no charge to your former employer's account.

### If You Disagree with this Decision

If you disagree with this decision, you may appeal. Submit your appeal online, by fax, or by mailing on or before 06-26-15. TWC will use the postmark date or the date we receive the fax or online form to determine whether your appeal is timely. If you appeal by fax, you should keep your fax confirmation as proof of transmission. Please include a copy of this notice with appeals correspondence. You must appeal each determination separately.

Mail the appeal to:

You may appeal by submitting TWC's online appeal form. Go to www.texasworkforce.org Appeal Tribunal
Texas Workforce Commission
101 E. 15th Street
Austin, TX 78778-0002
Or fax to (512) 475-1135

Please See Reverse For How To File An Appeal.

BD300E 06/27/2013

Case No.: 9
Claim ID.: 05-10-15
Claim Date: 05-10-15

HEARING IMPAIRED CLIENTS CALL 711 for RELAY TEXAS 1011 WESTLAKE DRIVE AUSTIN, TEXAS 78746 PHONE: 512.410.1960 FAX: 512.410.6171 KERRY V. O'BRIEN TEXAS BAR NO. 24038469 KO@OBRIENLAWPC.COM TEXASEMPLOYEES.COM

October 21, 2015

via facsimile transmission

Appeals Tribunal Texas Workforce Commission fax: (512) 475-1135

Claimant: John Doe

SSN: XXX-XX- 1212

Dear Appeals Tribunal,

I have been retained to represent the claimant, John Doe, SSN: XXX-XX-1212. We hereby APPEAL all determinations for this social security number that are within their 14-day appeal period and request an appeal hearing on the matter. Please send me a courtesy copy of the Notice of Hearing and packet of information for the hearing.

I am also requesting that the hearing <u>not</u> be set on the following dates due to hearings and/or trial settings already calendared in other pending matters:

November: 10, 12 or 20 December: 7, 8, 10 or 11

Thank you for your consideration of this request.

Sincerely,

Kerry V. O'Brien

Ken o'Brie

## **EXHIBIT 3**

## Texas Workforce Commission

## **Notice of Telephone Hearing**

Date Mailed: JANUARY 26, 2015

Hearing Date:
FRIDAY, FEBRUARY 13, 2015

Call 1-800-252-3749
between 10:30 AM and 11:00 AM for your hearing.

Employer: PI Account: 1

Hearing Start Time:
11:00 AM
Central Standard Time

Hearing Officer:
B. VEGA

### WHAT YOU MUST DO:

- Send documents before the hearing. You may have documents that are important to your case. Review the contents of this packet carefully. If any documents are missing, immediately fax or mail copies of those documents to the hearing officer and the other party.
- Call in for your hearing. This hearing will be held by telephone conference call. On the hearing date, register online at https://tx.c2tinc.com/register or call (800) 252-3749 within the 30 minutes before the hearing start time. Give the operator the phone number where you can be reached for the hearing. If you call from a pay phone, be sure it can receive incoming calls.

The hearing may be your only chance to tell what happened, present your documents, and ask questions of the witnesses. If you do not register online or call (800) 252-3749 within the 30 minutes before the hearing start time, you may not be allowed to participate in the hearing. You will not have another opportunity to offer testimony unless you can establish good cause for why you did not call in as instructed. Employers who are not parties of interest (indicated above as NPI) do not have the right to request a new hearing, nor to appeal.

Visit www.twc.state.tx.us/ui/appl/claimants\_intro.html or www.twc.state.tx.us/ui/appl/employers intro.html for more information on the appeal and hearing process.

Appeal No: Hearing: 1
Appeal filed by: Claimant
Appeal Date: 01/08/2015
Initial Claim Date: 12/14/2014
Determination Date(s): 01/02/2015

B. VEGA, Hearing Officer Texas Workforce Commission PO BOX 271863 HOUSTON TX 77277 Hearing Officer (281) 888-4440 Fax No. (281) 888-4469

## **EXHIBIT 4**

Page: 1

### Benefits – Non-Monetary Determinations Fact Finding

SSN:	T EIDED D		e Nbr: 1	
Issue Nbr: 1 Stmt Nbr: 1	Type: FIRED Reason of: 5 Strnt of: Claim	n: <b>FIRED-INTAKE-INT</b> ant Taker	EKNET 1: 12-18-2014 05:	34:06 PM
Name: Title: Phone Stmt: <b>N</b>	Claim ID: <b>2014-12-14</b>	Claim Dt: <b>12-14-2014</b>	Rebuttal:	Footnote: N
Name of the per Title of the per Humana Reso Did something Y Explanation: They said becaustead of to m fired? N Explanation: N/A Did you do who N Explanation:	phone recordings and corson who told you that yources specific happen that causause reported personal calanagement, and said to lat you were warned about	ou were fired: u were fired: sed you to be fired?_ alls to another employee in the perso		
N/A			·	
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	Benefits –	Non-Monetary Detern Fact Finding	ninations	
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Name Phone Stmt: Y	Title: Claim ID: <b>2014-12-14</b>	Claim Dt: <b>12-14-2014</b>	Rebuttal: <b>N</b>	Footnote: Y

LEFT MESSAGE FOR: CLMT

ADVISED CALLING FOR

DATE AND TIME: 12/29/14 1010A

LEFT MESSAGE ON OR WITH: VM

INFORMATION TO DETERMINE AN ISSUE. DEADLINE TO RESPOND: 12/31/14 1030A GAVE CONSEQUENCES FOR FAILURE TO RESPOND BY DEADLINE. COMMENTS:

Page: 3

### Benefits - Non-Monetary Determinations Fact Finding

SSN: Issue Nbr: 1			n: VIOLATION OF CO		
Stmt Nbr: 3	of: <b>5</b>	Stmt of: Claim:	ant take	n: <b>12-30-2014 08:</b>	11:45 AIVI
Name: Phone Stmt: Y	Claim ID	Title: 0: <b>2014-12-14</b>	Claim Dt: <b>12-14-2014</b>	Rebuttal: <b>N</b>	Footnote: <b>Y</b>
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Name and title	of person	discharging cla	imant.		
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			TION WITH ME, THE	Y SAID THEY W	ERE GOING TO
ATE IT.					
Rule(s)/policy(	s) equally (	enforced?			
N Prior warning	(a <b>)</b> 9				
Prior warning( N	(5):				
Prior suspension	on(s)?				
N	` *				
Explain.					
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			END		
			NAGER, I DIDN'T WAN'. DID APOLOGIZE TO M		

TIME.

RESPOND: 1/2/15 830A

RESPOND BY DEADLINE.

HER THAT I HADN'T WANTED TO GET HER IN TROUBLE.
IF WE GOT A COMPLAINT THEN WE WOULD PULL THE CALL AND WRITE UP A REPORT THEN TAKE IT TO MANAGEMENT IF IT IS A VALID COMPLAINT.
THE PERSON WAS NEW AND HAD ONLY BEEN WITH THE COMPANY 1 MONTH AT THE

Page: 4

### Benefits – Non-Monetary Determinations Fact Finding

SSN: X Case Nbr: 1 Type: FIRED Reason: VIOLATION OF COMPANY RULE(S)/POLICY Issue Nbr: 1 Stmt Nbr: 4 Stmt of: **Employer** Taken: 12-30-2014 08:20:23 AM of: **5** Title: HR DIRECTOR Name: Phone Stmt: Y Claim ID: 2014-12-14 Claim Dt: 12-14-2014 Rebuttal: N Footnote: Y 1010119405 1 9405 2 4070 2 4011 2 DATE AND TIME: 12/30/14 822A LEFT MESSAGE FOR: LEFT MESSAGE ON OR WITH: VM ADVISED CALLING FOR INFORMATION TO DETERMINE AN ISSUE. DEADLINE TO

COMMENTS:

GAVE CONSEQUENCES FOR FAILURE TO

Page: 5

## Benefits – Non-Monetary Determinations Fact Finding

Issue Nbr: 1 Stmt Nbr: 5	Type: FIRED Resof: 5 Stmt of: Em	ason: VIOLATION	OF COM	Nbr: 1 IPANY RULE(S : 12-31-2014 07::	)/POLICY 57:55 AM
Phone Stmt: Y	Tit Claim ID: <b>2014-12-1</b>	4 Claim Dt: <b>12</b>	-14-2014	Rebuttal: N	Footnote: Y
1010119405 1 4070 2 4011 2					
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THOSE CALLS				LS AND THEY C	
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CALLS OTHER		OUR			AT SHOWS THE
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	1	RAINING			

## Employer Response to Notice of Application for UI Benefits

Claim Date: 12-14-2014 Claim Type: IC PGM	: REG Claim ID: 2014-12-14
Employer: Correct Last Employer: Monetarily Eligible: Source:	Y Y Other
Notice Sent: Due: Claimant Separation Reason:	12-19-2014 01-02-2015 FIRED
Responded: Response Type: Employer Separation Reason: TWC Action: Current Investigator:	12-23-2014  Confirmation #:  FIRED  ROUTE ONLY  CYNTHIA ROSS
Employm	ent Information
Date Range Worked: Gross Wages Earned:	Thru
Wages In Lieu Of Notice: On Temporary Layoff: Paid Vacation Days:	N Paid Thru: N Recall Date: N Paid Thru:
Responder's Name: Responder's Title: Contact Person:	TWC Account:  Phone: Phone:
Additional Informat	ion Regarding Separation
Inadequate Untimely	Employer Response
Employer Name: Employer ID: Late or Inadequate Response Total:	

### Issue Decision Log

SSN: Case Nbr: 1

Issue Nbr: 1

of: 1

Type: FIRED

Reason: VIOLATION OF COMPANY RULE(S)/POLICY

Program: REG Claim ID: 2014-12-14 Claim Type: IC Claim Dt: 12-14-2014

LEU.

Late LEU Response: N Interested Party: Y Charged: No

Other Employer:

Decision Date: 12-31-2014

Mailed Date: **01-02-2015** 

Weeks Disqualified: Deductible Amount: State:

End Date:

Begin Date: 12-14-2014

Incident Date:

Claimant Failed to Respond: N

Qualified: N

Rationale: CLAIMANT'S ACTIONS CONSTITUTE MISCONDUCT CONNECTED WITH THE WORK AND VIOLATE COMMON BUSINESS PRACTICE.

Conclusion: FIRED-VIOLATION OF COMPANY RULES AND POLICIES-DISQUALIFIED