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Navigating the Texas Unemployment Compensation System

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This paper is not intended as legal advice and any comments represent the opinions of John D. Pringle, not of his firm or clients of the firm.

Navigating the Texas Unemployment Compensation System

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Navigating the Texas Unemployment Compensation System

Unemployment benefits provide temporary income to qualified workers who lose their jobs through no fault of their own. Employers fund this program through their taxes; employees do not contribute to unemployment benefits. Newly liable employers who do not acquire compensation experience from a previously liable employer begin with a predetermined tax rate set by the Texas Unemployment Compensation Act. That rate is set by the Texas Legislature and is the greater of the average rate for all employers in the NAICS code to which they belong or 2.70%. The taxable wage limit is also set by statute and is currently $9,000.00 per calendar year, per employee.[1]

I. Misconduct

Texas Labor Code Section 201.012(a), defines Misconduct as

> the "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 the safety of employees."
>
> Subsection (b) of Section 201.012 provides that the "misconduct does not include an act in response to an unconscionable act of an employer or superior."

Termination for misconduct disqualifies an individual from receiving unemployment benefits. TEX. LAB. CODE ANN. § 207.044(a) (2006). To be disqualified from receiving benefits, the alleged act of misconduct must fit within the statutory definition. *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 709 (Tex. 1998).

An employer is not required to prove intent with respect to misconduct arising from the violation of a company policy or rule. *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986); *Lairson v. Tex. Employment Comm'n*, 742 S.W.2d 99, 101 (Tex. App. - Fort Worth 1987, no writ). However, mmismanagement, one of the prohibited acts constituting misconduct, does require proof of intent, or such a degree of carelessness as to evidence a disregard of the consequences, whether manifested through action or inaction. *Mercer v. Ross*, 701 S.W.2d at 831.

A. Examples of Misconduct

Misconduct includes falsifying an employment application when the employee marked "No" in response to a question specifically asking whether he had pleaded *nolo contendere* or had been granted deferred adjudication within the last ten years prior to his application. *Pavelka v. Tex. Workforce Comm'n*, No. 03-05-00293-CV; 2006 Tex. App.

[1] See Appendix 1 for additional information.

LEXIS 8773 * 12 (Tex. App. - Austin 2006, no pet. h). The employee testified at trial that he was aware that he was charged in 1994 for the unlawful carrying of a weapon. He testified further that he remembered being placed on twelve months' community supervision and that he paid a fine, but that deferred adjudication was never mentioned. The employee also stated that he did not attend the hearing at which his lawyer entered a plea of *nolo contendere* on his behalf. He explained that his lawyer informed him that if he successfully completed his community supervision there would be no record of the offense. The employee maintained that, at the time he completed his employment application, he believed everything relating to the 1994 charge had been dismissed when he was discharged from community supervision in 1996. *Id.* at 12 & 13.

Misconduct includes sexual harassment in violation of a company policy against harassment. *Goettman v. Tex. Workforce Comm'n*, No. 2-02-073-CV; 2003 Tex. App. LEXIS 2211 *10-11 (Tex. App. - Fort Worth 2003, no pet. h). Insubordination for refusing to sign a reprimand form is misconduct. *Burton v. Texas Employment Com.*, 743 S.W.2d 690, 693 (Tex. App. - El Paso 1987, writ denied).

An employee who had been counseled by his employer to stop following female employees and who had been warned that he would be discharged if he continued engaged in misconduct by continuing to follow female employees. *Nuernberg v. Texas Emp. Comm'n*, No. 01-94-00286-CV; 1994 Tex. App. LEXIS 2744 * 5 (Tex. App. Houston [1st Dist.] 1994, writ denied). Hospital employee engaged in misconduct by assaulting her husband's paramour at the paramour's home. *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998). [2]

B. Examples of No Misconduct

In *Tex. Emp't Comm'n v. Torres*, 804 S.W.2d 213, 214 (Tex. App. - Corpus Christi 1991, no pet.), Luis Torres was promoted to cashier at a McCoy's Building Supply Center in August or September, 1986. McCoy's Building Supply Center (McCoy) manager Mario Villarreal fired Mr. Torres on March 14, 1987. Mr. Villarreal testified that he fired Mr. Torres for making three pricing errors within a short period of time, in accord with a new company policy which Mr. Villarreal had announced in late February, 1987.

On March 6, 1987, Mr. Torres charged $ 6.19 for each of three items priced at $7.49, losing $ 3.90 for McCoy's. On March 9, 1987, Mr. Torres charged $ 6.99 for an $ 8.59 item, losing $ 1.60 for McCoy's. On March 14, 1987, Mr. Torres charged $ 114.65 for a water heater which was priced at $ 149.95. Since it discovered the error before loading the water heater for the customer, McCoy's did not actually lose the $ 35.30.

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[2] The Texas Workforce Commission publishes a 167 page Appeals Policy and Precedent Manual which contains additional examples of misconduct. A copy or portions of the Appeals Policy and Precedent Manual can be obtained at http://www.twc.state.tx.us/ui/appl/app_manual.html

Mr. Torres testified that a cashier is under pressure to work quickly as well as accurately. He testified that many prices, including sale prices, are listed in a big book instead of being marked on the item. According to Mr. Torres the book is a continuous list of stock numbers and prices with no double spacing. He testified he believed the water heater was on sale, but it turned out that the sale price did not apply to that model. He also testified that all of the cashiers made mistakes. No one testified that the errors were deliberate, and Torres testified that he did not intentionally use any incorrect prices. *Tex. Emp't Comm'n v. Torres*, 804 S.W.2d at 215. The mere failure to perform the tasks to the satisfaction of the employer, without more, does not constitute misconduct which disqualifies an employee from benefits. *Id.* at 215-16.

The failure to complete firefighter training to due health issues was not misconduct. *Tex. Workforce Comm'n v. City of Houston*, 274 S.W.3d 263, 268 (Tex. App. - Houston [1st Dist.] 2008, no pet. h).

In *Elfer v. Texas Workforce Commission*, 169 Fed. Appx. 378 (5th Cir. 2006) (not designated for publication), an air traffic controller, was terminated because he was unable to obtain a required certification for radar-approach control. The failure to obtain certification was not misconduct but merely an "inability to perform his job to the satisfaction of his employer."

Merely touching a co-worker's shoulder, although a violation of the employer's policy was not misconduct. *Miller of Denton, Ltd. v. Tex. Workforce Comm'n*, No. 2-07-076-CV; 2008 Tex. App. LEXIS 2231 * 9 (Tex. App. - Fort Worth 2008, no pet. h). Not every violation of an employer's policies will trigger denial of unemployment benefits. *Id.*

II. Preparation for Discharge of an Employee

A. Employment Manual

The definition of misconduct includes a violation of a policy or rule adopted by the employer to ensure the orderly work and the safety of employees. The employer should have written policies or an employment manual containing such policies.

Written policies are an employer's first line of defense when a current or former employee questions the legality or appropriateness of a policy or its application. Written policies also serve as an invaluable reference point when questions about an employer's practices are raised. Jennifer Hauge & Melanie Herman, *Taking the High Road: A Guide to Effective and Legal Employment Practices for Nonprofits (*2d ed. 2006). While written policies can be a dangerous trap, it is usually only if the employer does not apply the policies equally. In my opinion the benefits outweigh the risk. The benefits include:

> *Written policies provide a starting point for consistency.* They represent an effective way to communicate a common message to all employees. Each person receives the same information about the employer's policies. Written policies help

avoid the risk that individual supervisors will apply a personal interpretation to the policies, resulting in the inequitable treatment of employees.

Written policies provide admissible evidence of the organization's policies. Should the employer need to defend its employment practices at an administrative hearing and in court the written policies are evidence of the employer's conduct.

Written policies establish the business related reason for an employment action, reducing the possibility that the employer's conduct will be challenged as subjective and discriminatory.

In *Texas Empl. Comm'n v. Wilson*, No. 04-96-00310-CV; 1997 Tex. App. LEXIS 1285 * 1-2 (Tex. App. - San Antonio 1997, no pet. h), Jerry Wilson, was employed as a chef with the San Antonio Country Club (SACC) from June of 1989 to November of 1993. Employees of SACC work under the provisions of an employee manual. Among other things, the manual provides that:

> If something comes up unexpectedly and an employee cannot come to work, he should call his supervisor as soon as possible….An employee who is absent from work for two (2) or more working days and who fails to inform his manager during that day will be considered as having quit his or her job.

On Tuesday, November 2,1993, Mr. Wilson was feeling depressed and did not report to work. He called SACC and spoke with the secretary of the catering manager. He informed the secretary that he was ill and would not be coming to work that day. Mr. Wilson DID NOT speak with his own supervisor, Jerry Jilinek. In fact, Mr. Jilinek was never informed that Wilson would not be at work on November 2. On November 3 and 4, Mr. Wilson again failed to report to work. He did not notify Mr. Jilinek or anyone else at SACC that he would be absent on November 3, 1993.

On November 4, Mr. Wilson's wife went to SACC to pick up his paycheck. She presented Jilinek with a doctor's certificate indicating that Mr. Wilson had been under a doctor's care from November 4 to November 5 and could resume work on November 6. Mr. Jilinek informed Mr. Wilson's wife that Wilson's employment with SACC had been terminated. *Id*. at *3.

Mr. Wilson acknowledged that he was aware of SACC's written attendance policy. This probably resulted in his losing his claim for unemployment compensation benefits.

B. Quit or Discharge

The question of whether an employee quit or was fired is important. It determines who has the burden of proof in a claim for unemployment compensation benefits case. The burden of proof in an unemployment claim falls on the party that initiated the work separation. If an employee quit, he has the burden of proving that he had good cause

connected with the work to resign when he did. If the employee was fired, the employer has the burden of proving (1) that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge and (2) that the employee either knew or should have known he or she could be fired for such a reason.

The Workforce Commission will likely rule in a case as follows:

1. Whoever first brought up the subject of a work separation might be held to be the one who initiated the separation.

2. "Mutual agreement" work separations are usually held to be discharges.

3. A resignation under pressure is a form of discharge. If the employee had no effective choice but to leave when he or she did, it was an involuntary work separation, and the employer's chances in the case will depend upon its ability to prove misconduct.

4. If an employee expresses a vague desire to look for other work, and the employer tells the employee to go ahead and consider that day to be his final workday that will usually not be considered a resignation, since no definite date has been given for the final day of work.

5. If the encounter starts out as a counseling session or a reprimand, and the employee gets discouraged and offers to quit, watch out. If the employer immediately "accept the resignation," the resignation might be considered a discharge. It would be better to remind the employee that the employer just wanted to talk about a problem, not let the employee go. The employer should ask the employee whether resignation is really what he or she wants. If he or she then confirms that they want to resign, ask how much notice he or she is giving. If given two weeks notice or less, and the employer accepts the notice early within the two weeks period, it will still be a quit, not a discharge. (An employer does not have to pay an employee for the portion of a notice period that is not worked, unless company policy promises such a payment.)

6. If the employee wishes to resign, do not have the employee sign a prepared, fill-in-the-blank resignation form. That will look suspicious. The employee might claim that he or she was forced to sign the prepared form or else was tricked into signing it, which will hurt the employer's case. Have the employee fill out a resignation letter in his or her own words, preferably in his or her own handwriting, if you can persuade the employee to cooperate to that extent.

7. If an employee offers to resign, but the employer convinces the employee to stay, and then later changes its mind and "accept the resignation," the

employer has just discharged the employee! Persuading an employee to stay after they have tendered their resignation amounts to a rejection of the resignation. This means that the offer to resign expired. The employee's acceptance of an employer's plea to stay amounts to a rescission of the resignation. This is basic contract law.

8. If an employee asks to be laid off, be careful - that can be a trap. Do not react like some employers have and fire the employee. Remember, if the employee resigns, they have the burden of proving good work-related cause to quit. It would probably be best to answer any layoff requests with a response to the effect that the request is denied and a reminder that the employee is still needed, thus placing the ball back in the employee's court. If the employee persists, follow that up with a statement to the effect that if the employee no longer wishes to work there, they need to submit a resignation request in writing, and remind them that in the meantime, they still have a job to do. Again, do not prepare a resignation letter for the employee to sign -- have the employee prepare their own statement of resignation, and then respond to that statement in writing. Be sure that any exit paperwork reflects that the employee resigned.

9. If the employer is merely counseling an employee about a matter of concern, and the employee responds with questions and comments like:

   a. "Are you telling me I'm fired?"

   b. "So you're firing me for this?"

   c. "I can't believe you're firing me for this!"

   Be careful. Statements like the foregoing are often seen in situations where the employee is trying to maneuver the employer into a premature discharge in the hopes that an unemployment claim might turn out favorably for the employee. The best response is something like this: "No, I am telling you that you need to start paying attention to instructions and following the rules." Make it clear to the employee that the employer is focused on improving the employee's performance or on getting them to comply with policies. Put the burden of quitting on the employee.

C. Notice

The amount of notice can be important in a Workforce Commission unemployment compensation benefits case. The rule followed by the Commission recognizes that two weeks notice is standard in most businesses. If an employee gives notice of intent to resign by a definite date two weeks or less in the future and you accept the notice early at your convenience, it will be regarded as a resignation, not a discharge. If more than two weeks' notice is given, but you wait until two weeks or less before the effective date of resignation to accept the notice early, then you should have a good

chance of having the Commission regard the work separation as a resignation, although not all claim examiners and hearing officers agree. An employer needs to be careful in this situation. If more than two weeks notice is given by the employee, and the employer accepts the notice more than two weeks in advance but without paying wages in lieu of notice (payment for a notice period not worked is not required unless such a payment is promised in writing), the situation is likely to be considered a discharge, with the burden of proof falling squarely on the employer to prove misconduct connected with the work.

The same rule works in reverse when an employer gives advance notice of a layoff or termination. If the notice is two weeks or less, and the employee accepts the notice by leaving within the two-week period, the work separation will still be considered involuntary, and the employer will have to prove misconduct if the employee is to be disqualified from unemployment benefits. However, if the notice is longer than two weeks, and the employee leaves ahead of the final two-week period, the work separation would presumably be voluntary in nature, and the employee would have the burden of proving good cause connected with the work for resigning.

An employee may give a murky resignation notice (open-ended, or giving the employer multiple options). If the employer needs the employee to stay, the employer can try the following to minimize the risk of a "layoff at the employer's convenience" ruling:

1. respond with a memo rejecting the resignation notice - let the employee know it is not convenient for the employer that the employee resign at that time, so the employer really needs for the employee to stay, with no change in the employment agreement; or

2. completely ignore the resignation notice - if the employee resubmits the same resignation notice, admonish the employee that the notice does not look like a resignation, since there is no definite date given for the last day of work. Ask the employee to withdraw the notice and not submit it again until the employee actually wants to stop working.

All of the above is aimed at getting a real resignation notice with a definite date of resignation two weeks or less in the future. Adopt a policy informing employees that no open-ended notices of resignation will be accepted - any notice of resignation must contain a definite date of last work. The policy should remind employees to use caution in submitting a letter of resignation, because once the employer takes action on it, it may be too late to rescind the notice.

It can be difficult for an employer to protect itself in a “resignation” unemployment benefits case and "prove" that an employee quit. In many such cases, the ex-employee later alleges the employer fired them. The most common situation involves a resigning employee quitting without notice, informing only a co-worker of that fact, and leaving the employer with no resignation letter to prove it was a resignation. Invariably, the sudden resignation causes one or more co-workers to have to work extra hours. To document that the employee resigned, have the co-worker write a memo to the employer explaining the call or contact with the ex-employee and why the co-worker

worked the extra time. Such a memo serves two purposes: (1) it explains why the co-worker worked outside the schedule; and (2) more importantly, it increases the credibility of the assertion that the employee quit, in case the employee disputes that fact in an unemployment claim. Ideally, the co-worker would be available later to give firsthand testimony confirming what he or she wrote in the memo. Of course, such a memo will not cover every possible resignation-without-notice situation, but it is an example of how an employer can protect itself in a resignation case.

In close cases the Commission will decide that the work separation was involuntary. Employers should be prepared with both documentation and witnesses to prove their cases either way in the event of a dispute over the nature of the work separation.

D. Discharge

A work separation is involuntary if initiated by the employer. An employer initiates a work separation by taking some kind of action that makes it clear to the employee that continued employment will not be an option past a certain date. In such a situation, the employer has more control than the employee over the fact and the timing of leaving the work. There are many ways in which a work separation can be involuntary:

1. Layoff, reduction in force, or downsizing - work separation due to economic inability to keep the employee on the payroll;

2. Temporary job comes to an end - work separation due to work no longer being available because the job is simply finished;

3. Discharge or termination for misconduct or "cause;”

4. Resignation in lieu of discharge - same as discharge, but the employer gives the employee the option of resigning as a face-saving option;

5. Forced retirement - may be akin to an economic layoff or a discharge for cause, but in this situation, the employee is allowed to qualify under a retirement plan;

6. "Mutual agreement" - in most cases, this form of work separation is viewed as involuntary, since it is usually initiated or encouraged by the employer; or

7. Unpaid suspension of four days or longer.

When terminating an employee for misconduct the employer should be able to show and have:

1. that there was a specific incident close in time to the discharge;

2. the employee violated a known employer policy or a law;

3. there are witnesses who will testify for the employer;

4. there is documentation to support reason(s) for termination;

5. the employee progressed all the way through any disciplinary process; and

6. the employee was informed of the problem or confronted with the problem and given a chance to explain his or her behavior prior to termination.

The employer should be sure that no discrimination issue exists when terminating an employee. The employer should determine if the employee belongs to a protected class. The most common protected class categories are race, color, religion, gender, age, national origin (including citizenship status), and disability. An employer should also know if he employee is a veteran.

The employer must be able to show that (1) the treatment given to the discharged employee was no different from that given to non-protected classes; (2) that the treatment given to the employee was no different from that given to other employees in general; (3) that the employee was not involved in a protected activity; (4) that the employee is not involved in a claim over wages, workers' compensation or discrimination; (5) the employee is not serving on a jury or on military duty.

An employer cannot discharge an employee because the employee refused to commit an illegal act or inquired about the legality of an instruction from the employer.

Texas does not require the employer to give a "pink slip" or work separation notice to a discharged employee. However, giving a simple work separation notice can help prevent ex-employees from filing wage claims based upon "work" they allegedly did after the employer thought they were gone. An employer does not have to give an explanation of the reason or reasons for discharge, and an employee is not required to give an explanation for a resignation. If an employer gives a reason for discharge make the explanation brief and to the point - the "pink slip" is not the time to make an example of someone or to "rub it in" - in general, the shorter the explanation is, the better.

If giving notice of termination the employer should avoid inflammatory language or anything that is not documented. Do not defame the discharged employee. Certain terms are defamatory *per se*, such as "thief," "stealing," or "drug abuser. The use of non-inflammatory descriptive terms that can be documented, such as "violated drug-free workplace policy by testing positive for marihuana" are acceptable.

III. Claim for Unemployment Compensation

According to the Workforce Commission, to qualify for benefits based on the employee's job separation he or she must be either unemployed or working reduced hours through no fault of his or her own, such as a layoff, a reduction in hours or wages not related to misconduct, or being fired for reasons other than misconduct.

If the employee quits for good work-related reasons such as unsafe working conditions or a change in pay or hours, the employee may have to present evidence that he or she tried to correct the problem before quitting. An employee may collect benefits if:

1. The employee had a medically documented illness that prevented the employee from working, but he or she is now able to work;

2. The employee quit to move with his or her spouse (Texas reduces the number of weeks and benefits you can receive. This reduction does not apply to most military spouses); or

3. The employee has a well-documented case of family violence or stalking.

The employee initiates the claim for unemployment compensation benefits. The Workforce Commission encourages electronic submission of the claim for benefits. This presumes the employee has a computer and Internet access. As part of the application the employee is required to provide:

1. Last Employer Contact Information;

2. Military Information, if applicable;

3. Last Employer Location;

4. Last Job Information;

5. Dates Worked for Last Employer;

6. Salary and Work Hours;

7. Normal Wage for Occupation; and

8. Reason No Longer Working.

The Workforce Commission also encourages the employer to respond to the claim for benefits online.

The employer should receive a Notice of Application for Unemployment Benefits. This is a computer generated form and the Workforce Commission does not have blank forms available to the public. A copy of what the Notice of Application for Unemployment Benefits looks like can be found in Appendix B. The employer will be asked to complete a Work Separation Details form that can be found in Appendix C. You will note that Box 3 of the Work Separation Details form asks for a detailed explanation of "Fired" and "Quit" separations.

The author believes that the Workforce Commission should be informed generally of the misconduct the employer claims the employee engaged in resulting in termination. For example, if the employee threatened a co-worker, the employer might say: "Claimant violated company policy X, which was adopted to ensure the orderly work and the safety of employees, by threatening co-worker John Doe with bodily harm on ___ (date)." If the Commission asks for additional information, then more information can be provided at that time with more specific factual information.

It may take about four weeks for the Commission to determine whether the employee qualifies for benefits. The Commission will mail the employee and employer a decision on whether the Commission will pay the benefits. If either party disagrees with the decision, they can appeal the decision.

IV. Dispute Resolution before the Workforce Commission

An examiner shall first determine whether a claimant is disqualified from receiving benefits. The examiner shall mail a copy of the determination to the claimant and employer. An examiner's determination is final for all purposes unless either the claimant or employer files an appeal from the determination not later than the 14th calendar day after the date on which the copy of the determination was **mailed** to the last known address of the claimant or employer or the examiner makes a redetermination as provided by Labor Code Section 212.054. [3]

A. Appeal Tribunal

An appeal tribunal shall hear the appeal from the initial determination. An appeal tribunal is composed of a salaried examiner. TEX. LAB. CODE § 212.101(b). The appeal tribunal shall affirm or modify the determination of the examiner after giving the

[3] Labor Code Section 212.054 provides that if the examiner discovers an error in connection with a determination or discovers additional information not previously available, the examiner may reconsider and re-determine the initial determination. Any examiner's redetermination replaces the original determination and becomes final unless the claimant or the employer files an appeal from the redetermination not later than the 14th calendar day after the date on which a copy of the redetermination is mailed to the claimant's or employer.

parties reasonable opportunity for fair hearing. The hearings are conducted by telephone. All hearings are to be conducted informally and in a manner to ensure the substantial rights of the parties. I have found the hearings to be more formal than informal. All issues relevant to the appeal shall be considered and ruled upon. The parties to an appeal before an appeal tribunal may present evidence that may be material and relevant as determined by an appeal tribunal. The appeal tribunal is required by law to make every effort to obtain all relevant facts and evidence from the parties to the appeal. Frequently the appeals tribunal will ask the parties and any witness questions about the facts so as to appear biased against one party or the other. Testimony at any hearing on a disputed claim shall be recorded. TEX. LAB. CODE § 212.002(b).

Either prior to or during a hearing, an appeal tribunal, on its own motion or on the motion of a party of interest, may continue, adjourn, or postpone a hearing. The continuance, adjournment, or postponement shall not be for the purpose of delaying the proceeding and may be granted due to illness of the appealing party (appellant), death in the immediate family of the appellant, or a pending criminal prosecution of the appellant. A continuance, adjournment or postponement may also be granted at the request of the appellant or appellee when there is a need for an interpreter, religious observance, jury duty, court appearance, active military duty, or other reasons approved by the supervisor of appeals. Prior to the hearing, requests for a continuance or a postponement of a hearing may be made informally, either orally or in writing, to the appeal tribunal designated to hear the appeal or to the supervisor of appeals.

If a party fails to appear for a hearing, the appeal tribunal may hear and record the evidence of the party present and the witnesses, if any, and then proceed to decide the appeal on the basis of the record unless there appears to be good reason for continuing the hearing. A copy of the decision shall be promptly mailed to the employee and employer with an explanation of the manner in which, and time within which a request for reopening may be submitted.

A party to the appeal who fails to appear at a hearing may, within 14 days from the date the decision is mailed, petition for a new hearing before the appeal tribunal.

At the conclusion of a hearing of an appeal, the appeal tribunal shall issue its findings of fact and decision with respect to the appeal. The decision shall be in writing and shall reflect the name of the appeal tribunal who conducted the hearing and who rendered the decision. In the decision, the appeal tribunal shall set forth findings of fact and conclusions of law, with respect to the matters on appeal, and the reasons for the decision. The parties to an appeal shall be notified of the appeal tribunal's decision and the reasons for the decision. The decision of an appeal tribunal is the final decision of the Commission unless further appeal is initiated not later than the 14th day after the date the decision is mailed.

B. Appeal to the Commission

When an appeal to the Commission is filed, all evidence and records pertaining to

the appeal shall be submitted to the Commission for its review. The Commission may, (1) without further hearing, affirm, reverse or modify any decision of an appeal tribunal on the basis of the record made before the appeal tribunal; (2) grant a further hearing on the matter and notify the parties to appear before the Commission (or before a representative of the Agency designated to hold hearings for the Commission); (3) direct an appeal tribunal to take additional evidence necessary for the proper disposition of the appeal; or (4) remand a case to the appeal tribunal for the appeal tribunal to hold a de novo hearing.

All hearings conducted by the Commission, or before its representative shall be conducted in the manner as the hearings before the appeal tribunal. If the appeal tribunal is directed to take additional evidence, upon completion of the taking of additional evidence, the complete record involved in the appeal shall be returned to the Commission for its decision.

If the Commission remands a case to the appeal tribunal for the appeal tribunal to hold a de novo hearing, then the appeal tribunal shall set aside the prior appeal tribunal decision and issue a new decision. The new decision shall be subject to all the provisions relating to appeals.

The Commission shall render its decision with respect to an appeal as soon as possible after reviewing the case. The decision shall be in writing and shall reflect the names of the members of the Commission who participated in the review. If a decision of the Commission is not unanimous, the decision of the majority shall control, but the minority member may file a dissent from the decision.

A copy of the Commission's decision shall be mailed to the parties. Any party desiring a rehearing shall file a motion for rehearing within 14 days after the date the decision is mailed. A motion for rehearing may be filed by hand delivery, mail, common carrier, facsimile (fax) transmission, or other method approved by the Commission in writing.

A motion for rehearing shall not be granted unless each of the following three criteria is met: (1) there is an offering of new evidence, which was not presented at the appeal tribunal level; (2) there is a compelling reason why the evidence was not presented earlier; and (3) there is a specific explanation of how consideration of the evidence would change the outcome of the case. The Commission shall deny a request for rehearing unless it can be shown there are substantial reasons for the Commission to grant the rehearing.

Labor Code Section 212.004(b) provides that unemployment benefits shall be paid promptly in accordance with:

(1) a determination or redetermination of an examiner;

(2) a decision of an appeal tribunal;

(3) a decision of the commission; or

(4) a decision of a reviewing court.

V. Judicial Review

A. Substantial Evidence Review

Judicial review of an administrative decision regarding a former employee's right to unemployment benefits requires a trial de novo with substantial evidence review. TEX. LAB. CODE § 212.202; *Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998). Under this standard the Texas Workforce Commission's decision is presumptively valid, which places the burden on the party challenging the agency decision. *Id.* at 708. When the trial court examines whether there is substantial evidence to support Workforce Commission's decision, it determines whether reasonable minds could have reached the same conclusion the agency reached. *Dotson v. Tex. State Bd. of Med. Exam'rs*, 612 S.W.2d 921, 922 (Tex. 1981). While the court will hear and consider evidence to determine whether reasonable support for the agency's order exists, the agency remains the primary fact finding body, and the question for the trial court is strictly one of law. *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984). The challenging party must therefore produce evidence that conclusively negates all reasonable support for the agency's decision, on any possible ground. *Id.*

The trial court may not set aside a Workforce Commission decision merely because there was conflicting or disputed testimony or because the court would reach a different conclusion. *Mercer v. Ross*, 701 S.W.2d at 831. Rather, if the agency heard substantial evidence supporting either an affirmative or a negative finding, the trial court must allow the agency's order to stand. *Id.* In fact, because substantial evidence is more than a mere scintilla, but less than a preponderance, the evidence may preponderate against the decision of the agency, but still amount to substantial evidence. *City of Houston v. Tippy*, 991 S.W.2d 330, 334 (Tex. App. - Houston [1st Dist.] 1999, no pet.). The court may only set aside the agency's decision if it finds the decision to have been made without regard to the law or the facts and therefore was unreasonable, arbitrary, or capricious. *Mercer v. Ross*, 701 S.W.2d at 831.

B. Procedure

Either party unhappy with the final decision of the Commission may seek judicial review of the decision by filing suit in a court of competent jurisdiction for review of the decision against the Commission. Suit must be filed not later than the 28th day after the Commission's decision is mailed to the parties. The other party to the proceeding before the Commission must be made a defendant in the lawsuit.

The lawsuit must be filed:

(1) in the county of the employee's residence; or

(2) if the employee is not a resident of this state, in:

(A) Travis County;

(B) the county in this state in which the claimant's last employer has its principal place of business; or

(C) the county of the claimant's last residence in this state.

The Commission is considered a party to any judicial action involving a final decision of the Commission. It is important to note that an appeal to Court does not affect the enforceability of the Commission's decision. Labor Code Section 212.004(b) requires that unemployment benefits shall be paid promptly in accordance a determination of the examiner, appeal tribunal, etc.

In my experience the Commission is usually represented by an Assistant Attorney General in Court. My friend and colleague at the Attorney General's Office, Anthony Aterno, often represents the Commission throughout the State. His depth of experience with unemployment law and judicial review is unrivaled. So as an employer, you want the Attorney General on your side. The Attorney General is going to represent the Commission in Court and will try to get the Court to affirm the Commission's decision regardless of who the Commission's decision was for.

A certified copy of a document from the Commission's records is admissible in evidence instead of the original document. TEX. LAB. CODE § 213.003. In determining whether there is substantial evidence to support the Commission's decision, trial courts look at the evidence presented at the trial de novo, not at the record created by the Commission, unless the administrative record was properly introduced in the trial court. *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986). The Commission's decision may be set aside only if the trial court finds that the decision was made without regard to the law or the facts and was therefore unreasonable, arbitrary, or capricious. *Id.*

Appendix A

Your Tax Rates - 2012

Your tax rate is the sum of five components. The sum of the five tax components multiplied by your taxable wages* computes the amount of tax you pay. The first four components have a role to play in ensuring adequate funding of benefit payments and ongoing solvency of the Unemployment Trust Fund.

The five components of your UI tax rate are as follows:

1. GENERAL TAX RATE (GTR)

The first component of your UI tax rate is the GTR, a tax that reflects your company's individual responsibility for repaying benefits paid to former workers. The GTR is the experienced-rated portion of your UI tax. It is called experience-rated because it is based on benefits that have been paid to former employees of your business and charged to your account (chargebacks). Your GTR is computed by multiplying your benefit ratio by the year's replenishment ratio**. Your benefit ratio is the result obtained by dividing the last three years of chargebacks to your account by the last three years of taxable wages you have paid to your employees on which the taxes have been timely paid. The three-year period used to compute the 2012 tax rate was from the fourth quarter of 2008 to the third quarter of 2011. If you have no chargebacks for the past three years and have timely reported and paid taxable wages for the same period, your general tax rate is zero (0.00%). Each year, the TWC computes the GTR by using this formula:

$$\text{GTR} = \frac{\text{Three Years of Chargebacks}}{\text{Three Years of Taxable Wages}} \times \text{Replenishment Ratio}$$

2. REPLENISHMENT TAX RATE (RTR)

The second component of your UI tax rate is the RTR, a flat tax paid by all employers. Its purpose is to replenish the trust fund for one half** of the benefits paid to eligible workers that were not charged to any specific employer. Since no one employer can be held liable for these benefits, the Legislature decided to spread the cost among all experience-rated employers. Each year, the TWC computes the RTR by using this formula:

$$\text{RTR} = \frac{\text{One-half benefits paid but not charged to any employer}}{\text{One Year's Total Taxable Wages}}$$

3. **UNEMPLOYMENT OBLIGATION ASSESSMENT RATE (OA)**

The third component of your tax rate is the Unemployment Obligation Assessment. The purpose of the Unemployment Obligation Assessment is to collect (1) amounts needed to pay bond obligations due in 2012 and (2) interest due on loans from the federal government.

The Unemployment Obligation Assessment is the sum of two parts:

1. Bond Obligation Assessment Rate

The Bond Obligation Assessment Rate is determined by this formula:

(Prior Year Rate x OA Ratio) x Yield Margin (Percentage) this product rounded to the nearest hundredth. The prior year rate is the sum of your 2011 General Tax, Replenishment Tax, and Deficit tax.

The Commission sets the Obligation Assessment Ratio and the Yield Margin (Percentage). Those two factors are the same for all employers subject to the Unemployment Obligation Assessment.

The 2012 Obligation Assessment Ratio (OA Ratio) is 0.17.

The calculation of the OA Ratio is according to Commission Rule:

$$\text{OA RATIO} = \frac{\text{Principle, interest, and administrative expenses due in 2012 on outstanding bonds}}{\text{Tax due from the General and Replenishment tax rates for the four quarters ending June 30th of the previous year.}}$$

The result is rounded to the next hundredth.

The 2012 Yield Margin (Percentage) is 0.95. The Yield Margin (Percentage) is determined by Commission resolution.

2. Interest Tax Rate is used to pay interest on loans from the federal government. This percentage will be the same for all employers in a given year.

The Interest Tax is calculated according to Commission Rule.

The Interest Tax Rate for 2012 is 0.00%.

4. **DEFICIT TAX RATE (DTR)**

The fourth component of your tax rate is the Deficit Tax Rate. If the amount of money in the compensation fund on a tax rate computation date is less than the floor of the compensation fund, a DTR is added for the next calendar year to the GTR for each employer entitled to an experience rate for that year. The 2012 DTR was set at 0.00% based on Commission initiative.

5. **EMPLOYMENT AND TRAINING INVESTMENT ASSESSMENT (ETA)**

The fifth component of your tax rate is the Employment and Training Investment Assessment. It is a fixed rate of 0.10% to fund the Skills Development Fund. By law, the RTR is reduced by the same amount, so there is no increase in your tax rate due to this assessment.

EFFECTIVE TAX RATE

Your Effective Tax Rate for 2012 = General Tax Rate (GTR) + Replenishment Tax Rate (RTR) + Obligation Assessment Rate (OA) + Deficit Tax Rate (DTR) + Employment Training Investment Assessment (ETA).

Minimum Tax Rate for 2012 is 0.61%.

Maximum Tax Rate for 2012 is 7.58%.

*You pay unemployment tax on the first $9000 that each employee earns during the calendar year. Your taxable wages are the sum of the wages you pay up to $9000 per employee per year.

** The 68th Legislature (1983) made the decision to recoup paid but "non-charged" benefits in two ways. The total amount owed to the Fund but not charged to any employer is divided in half and one half is collected by a multiplier (the replenishment ratio) applied to the GTR. The replenishment ratio for 2012 is 1.32. The other half is collected by the RTR itself. The RTR for 2012 is 0.42%.

Source: Texas Workforce Commission

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UI Support & Customer Service
TEXAS WORKFORCE COMMISSION
BOX 149346
AUSTIN TX 78714-9346

APPENDIX B

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NOTICE OF APPLICATION FOR UNEMPLOYMENT BENEFITS

Date Mailed: June 25, 2010

[redacted]

All dates are shown in month-day-year order.
Account Number: [redacted]
Name: [redacted]
Social Security Number: [redacted]
Access Key: [redacted]

IMPORTANT

Protect your interests! Use the Internet, call, fax or have your response postmarked on or before 07-09-10. The person named above filed an application for unemployment benefits naming you and/or your organization as the last place worked before filing. State law requires we notify you of this action. If you are an employer covered by the Texas Unemployment Compensation Act, the decision the Texas Workforce Commission (TWC) renders on this application could affect the amount of taxes or reimbursements you pay.

How do I protect my appeal rights? To receive a copy of any determination TWC makes and to protect your right to appeal, respond on or before 07-09-10, complete the reverse side of this form in detail and be prepared to answer any additional questions.

How do I submit my response? You have four response options. Only one is necessary to protect your interests.

* Respond by using the Internet at www.texasworkforce.org/ui/er.html Enter the Social Security Number and Access Key found above. At the completion of your entry you may print a confirmation sheet as proof of your response.

or * Call TWC at (888) 876-6107, Monday through Friday, between 8:00 a.m. and 5:00 p.m. central time to respond verbally. A Customer Service Representative (CSR) will take your information. When completing the call the CSR will give you an 11-digit confirmation number. You must speak with a CSR and receive a confirmation number. Leaving a voice message does not constitute a response. Record the number in the spaces below and keep this notice for your records.

or * Fax the notice to (512) 322-2815. When faxing, be sure to include both sides of the page. TWC will use the date we receive the fax to determine whether your response is timely. If you file your appeal by fax, you should retain your fax confirmation as proof of transmission.

or * Mail a copy of this notice and any attachments to the TWC address located in the upper left-hand corner.

Please Note: We may allow the applicant an opportunity to respond in a fact finding interview, if the information you submitted does not agree with his/her initial statement. If you want to participate during the initial interview, please indicate so in your response. TWC will notify you how you may participate. The applicant gave the following statement when he/she filed the application for unemployment benefits.

REASON NO LONGER EMPLOYED

PERMANENT LAYOFF

If you have difficulty interpreting the applicant's statement, call TWC at the telephone number listed above.

Case No.:
Claim ID.: [redacted]
Claim Date: 05-20-10
Entity ID.:

FOR HEARING IMPAIRED CLIENTS
Relay Texas TDD No.: 1-800-735-2989
Voice No.: 1-800-735-2988

PLEASE ANSWER ALL QUESTIONS ON REVERSE

BD610E 03/26/2009

APPENDIX C

Work Separation Details

Please answer the following questions regarding:

Applicant's Name: CAROL J ANDREE	SSN: 264-94-9242
1. We have your TWC account number as 06-445769-1 If the actual number is different from this, print the correct number in the box at the right.	Account Number
2. Dates Worked. For temporary or seasonal employees, enter the start and end dates for the most recent assignment.	From / Through
Reason no longer employed: ☐ Permanent Layoff ☑ Fired ☐ Quit ☐ Reduced Hours ☐ Never Worked Here ☐ Still Working ☐ Temporary Layoff with Recall Date:	
3. Attach a detailed explanation of Fired and Quit separations. Include the applicant's name and SSN on each attachment. * If the applicant was fired, include relevant company policies, any warnings given, the date and nature of the last incident causing the termination, and the name of the person who discharged the applicant. * If the applicant quit, include the applicant's reason for quitting and whether the applicant gave any notice. TWC may disclose to the applicant any information you provide. NOTE: Failing to provide complete information may cause inappropriate benefit payments and raise employer taxes.	
4. Did you give the applicant advance notice of work separation?	☐ Yes ☑ No
4a. If no, did you pay the applicant wages instead of providing advance notice of work separation (wages in lieu of notice)?	☐ Yes ☑ No
4b. If yes, how many days notice did you pay?	
4c. If you paid wages in lieu of notice, what dates did the wages in lieu of notice cover?	From / Through
5. If the applicant is laid off temporarily, have you paid or will you pay the applicant holiday or vacation pay during the layoff?	☐ Yes ☐ No
5a. How many paid holidays or vacation days did or will the applicant receive?	
5b. If you paid holiday or vacation days, what dates did the holiday or vacation pay cover?	From / Through
Preparer's Signature: [redacted] Title: [redacted]	
Telephone Number: [redacted] Date [redacted]	
Contact Person [redacted] Phone Number [redacted] X	

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You may receive, review, and correct information TWC collects about you by contacting TWC Open Records at 1-866-274-0940.