

## **RE-CAP OF UNEMPLOYMENT COMPENSATION PRESENTATION AS PROMISED**

### 1. Here is a sampling of UC questions that I use to prepare my witnesses:

At the start, the Administrative Law Judge (ALJ) will introduce himself/herself to the parties and ask them what their position is for the hearing – do they agree or disagree that there was a termination – if there was a quit was it voluntary or for some qualifying reason? If there was a termination, was it for gross misconduct?

Note: Remember, an employee can only be denied UC benefits if they have voluntarily quit their employment and/or if they have committed “gross misconduct” (have they knowingly and willfully violated company policy?).

The ALJ will question the employer first since the employer always has the burden of proof.

1. Please state your name for the record.
2. What were the dates of the employee’s employment?
3. What is your position with the company?
4. What kind of business are you?
5. Was this employee terminated?
6. What was his/her position with the company
7. Why was he/she terminated?
8. How was this terminated communicated to him/her, what was said?
9. Was the employee provided anything in writing?
10. Are there other incidents of discipline that lead up to this termination?
11. Is there anything else the employer would like to add?

Subject to cross examination by employee who must ask questions – potential follow up from ALJ.

Does the Employer have any other evidence or witnesses that they desire to offer?

ALJ will question employee second.

1. Please state your name for the record.
2. Are you currently employed?
3. Did you work for company? How long? What was your position?
4. Have you been terminated?
5. Why were you terminated?
6. How was this communicated to you? – entire contents of conversation.
7. Had you ever been disciplined prior to this incident?
8. Were you given anything in writing relevant to this termination?
9. Is there anything else that you would like to add that you feel that I have not covered?

Subject to cross examination by Employer – potential follow up by ALJ.

Does the employee have any other witnesses or evidence they want to provide at this time?

ALJ will have if the parties have any other evidence that they wish to present and that he will deem relevant to this proceeding.

## 2. Fact Scenario Used for Skit:

Employee has been employed for employer for over five years. On January 22, 2006 she was terminated, by the way she is the only female manufacturing employee that you have (Note: caution, be aware of gender discrimination issues), but was provided nothing in writing and given no reason as to why (Note: not the best practice because gives employee feeling of unfairness, that employer is hiding something). Employer is not the greatest at recordkeeping period and is a smaller family owned business of approximately 25 employees. Employer conducts no performance evaluations. (Note: might be a pro if performance evaluations are not conducted consistently but can also be a con if legitimate performance concerns go undocumented).

On December 1, 2005, Employee reported sexual harassment by a co-worker. (Note: watch for sexual harassment and retaliation issues now). Employer questioned those that were referenced by Employee only and determined and substantiated that inappropriate things were being said on the production floor. (Note: this fact scenario now constitutes participation in protected activity for this employee). The co-worker that was found to have committed sexual harassment, who also happens to be the son of the owner, was sent to sexual harassment training, along with the entire plant floor. (Note: issue as to whether this was proper remediation or not).

On or about December 15, 2005, Employee reported inappropriate sexual remarks that were stated by numerous other co-workers. (Note: issue of ongoing sexual harassment and also retaliation for participation in prior protected activity – prior sexual harassment complaint). This time, management questioned fewer people and basically did nothing but counsel these male employees not to speak like this again. (Note: big issue as to proper remediation).

Meanwhile, Employee's life on the plant floor becomes more hostile as other co-workers find ways to harass her, including tampering with her production line which almost severely injured her, and clearly making it known that she was not welcome at the plant. (Note: safety issues, discrimination issues and retaliation). When Employee reported this behavior to management, she was told that management could not make people like her. (Note: management really not taking an active role in remediating this situation).

On January 3, 2006, Employee posted on the company bulletin board an invitation that had underlined handwriting on it stating "for friends only"- meaning management was not invited. Employee was asked to remove this bulletin board item and was angered as a result. (Note: did employer have any written policies on this issue, was employee given information that she was doing something wrong that could lead to termination, because if not, ALJ might decide that employer did not provide proper notice to support finding of gross misconduct to deny benefits).

Employee removed a page from an HR magazine derogatory of management and referring to them as “bossholes”, and posted this on the company bulletin board on January 10, 2006. Management removed the item and did not discuss it with Employee. (Note: notice issue again as to employee’s knowledge that she was knowingly committing a violation that could factor into her termination).

On January 20, 2006, Employee reported to work and got into an accident with a forklift. There were no injuries. Management forced her without any prior written policy or practice to subject herself to a drug screening and if she refused they would terminate her. During the test administration, the results indicated that Employee tampered with the specimen. (Note: drug testing should really only occur pursuant to an appropriate written personnel policy and in order for an employer to establish gross misconduct for UC purposes, the policy must clearly state that tampering with a specimen will result in termination).

On January 22, 2006, Employee was terminated.

### 3. Commentary

We reviewed whether or not it was in the best interest of an employer to challenge an employee’s right to benefits when they know that they will not prevail on proving misconduct. The problem with doing this is that you are creating an unnecessary adversarial situation. In the fact scenario above, this employer also risked providing discoverable unfavorable information to the opposing side.

Keep in mind that UC forums will potentially be used as a discovery tool for litigation. Also remember that you have the right to request a copy of the investigatory file prior to the hearing to review what the other side has said. Further, you have a right after the hearing to request the hearing tapes.

It is my sincere hope that this presentation was helpful and I wish you all the best of luck in this forum that contains many human elements. Always be prepared and concise with your presentation. Always bring witnesses that are necessary to prove up first hand the decisions supporting your reasoning for termination because if they are not present, then you might as well be prepared to forfeit your case 9 times out of 10. If the other side hires an attorney then you might want to seek the advice of your own.

Keep in mind that performance deficiencies, i.e. attendance violations, production concerns, etc. will not be deemed to be gross misconduct unless the employer has clearly laid out the consequences of an infraction, typically through a personnel handbook policy. Remember, the employer has the burden of proving that the employee knowingly committed a violation of policy that shows a disregard for their continued employment.