



by Joe Dunman

## Fighting Allegations of Misconduct in Unemployment Benefits Appeals

A frustrated person walks into your office with two big problems. The first, she was recently fired from her job. The second, she applied for unemployment benefits but her claim was denied because her former employer filed a protest, alleging that she was terminated for “misconduct connected with the work.” The former employee denies any kind of misconduct, but she needs your help. She wants to appeal the ruling but doesn’t know what to do.

A Kentucky worker fired from his job may apply to the Department for Workforce Investment Office of Employment and Training for unemployment benefits. As part of an initial determination of eligibility made by the Division of Unemployment Insurance, the worker’s former employer is notified of the claim and given fifteen days to respond “to qualify for potential relief of charges to [its] reserve account.”<sup>1</sup> In other words, to protest the worker’s claim so the employer doesn’t have to pay unemployment benefits.

Of the 160,597 claims for benefits filed by Kentucky workers in 2013, employers protested 58,718 of them (approximately 37 percent).<sup>2</sup> Protests resulted in 34,814 denied benefits claims (a denial rate of 59 percent).<sup>3</sup> The rate of denial was even higher at 66 percent in 2012.<sup>4</sup>

There are numerous bases for protests, but one of the most common is “misconduct connected with the work.”<sup>5</sup> Kentucky case law broadly defines misconduct as a “willful and wanton disregard of the employer’s interests.”<sup>6</sup> More narrowly, KRS Chapter 341 provides several specific examples of misconduct, which include (among others), a “knowing violation of a reasonable and uniformly enforced rule of an employer,” “refusing to obey reasonable instructions,” and “reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer’s premises during working hours.”<sup>7</sup>

What all this means is that an employee terminated for bad behavior at work is not eligible for unemployment benefits. Employer protests on that basis frequently result in an initial denial of worker claims.

However, within fifteen days of receiving notice of a denial, a worker/claimant may file an appeal to a referee appointed by the Unemployment Division.<sup>8</sup> That means the frustrated person who just walked into your office is not out of luck yet. He or she still has a chance at getting unemployment benefits.

The notice of appeal can be simple. It need only identify the claimant, the case number, and include a statement that the claimant seeks to appeal the determination denying benefits. It is not necessary to brief the claimant’s facts and arguments. If represented by counsel, the notice should include counsel’s contact information and a clear statement of representation.

The Unemployment Division then schedules a telephonic hearing and sends a copy of the claimant’s file roughly ten days prior along with a witness list (for distribution to the hearing officer and the employer) and instructions for requesting subpoenas for witnesses if necessary.

Hearings are conducted by telephone and are normally scheduled for one hour. A typical hearing functions like a mini trial, complete with witness testimony elicited by the hearing officer, the submission of documents and other evidence and cross examination of witnesses by the parties or their representatives. The rules of evidence are “relaxed,” meaning most exhibits and testimony submitted are allowed, including hearsay.

It is the employer’s burden to prove that the former employee was terminated for misconduct.<sup>9</sup> The standard of proof is a preponderance of credible evidence.<sup>10</sup>

Your primary responsibility, as the representative of a claimant appealing the denial of benefits for misconduct, is to play defense by attacking the credibility of the employer’s representative and/or witnesses. Listen closely to the questions asked by the hearing officer and to the answers received, cross examine aggressively, and carefully rehabilitate your client’s testimony however necessary.<sup>11</sup>

Though a worker can be terminated for any lawful reason or no reason at all under Kentucky law, unemployment benefits cannot be so easily denied. Remember that misconduct is more than just a disagreement between a boss and his or her report. It is more than a difference in opinion or a clash of personalities. Many employers (especially small businesses without competent human resources officers) protest benefits claims out of spite. Spite is an insufficient reason to deny a benefits claim, and this point should be emphasized during cross examination and in the closing statement. The employer must prove that the employee engaged in conduct specifically prohibited under KRS 341.370(6) or otherwise in bad faith against the employer's interests.

Usually between two to four weeks after the appeal hearing, the hearing officer files a decision including "find-

ings of fact, conclusions of law, and [a] final order with respect to the worker's eligibility" for benefits.<sup>12</sup>

**I**f you've screened your client well, you sufficiently prepared for the hearing and you conducted effective cross examinations of employer witnesses, you have significantly improved your client's chance to win the appeal.<sup>13</sup>

Overall, the success rate on appeal is roughly equal for employers and claimants. In 2013, employers won 30 percent of their appeals while claimants won 29 percent.<sup>14</sup> In 2012, the success rates were 32 percent and 29 percent, respectively.<sup>15</sup> Unfortunately, the Unemployment Division does not track the number of claimants represented by counsel during their appeals, nor their win rate.

A referee's decision is not neces-

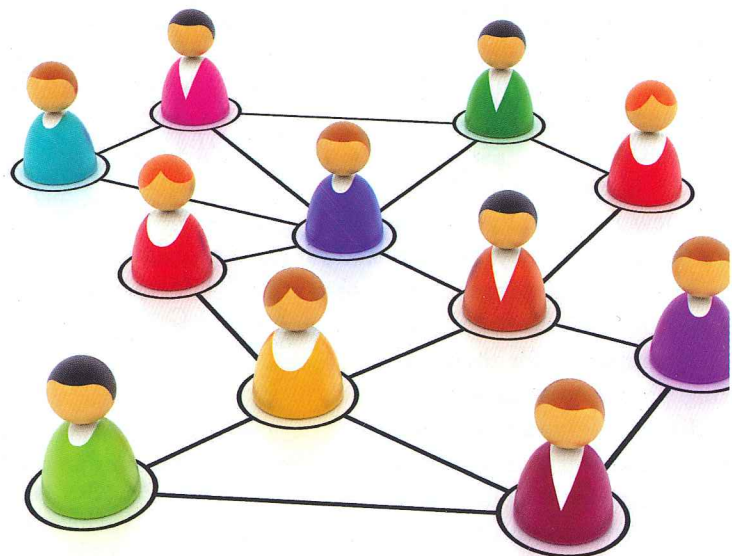
sarily the end of the road, however. The losing party may seek further appeal to the Unemployment Insurance Commission within fifteen days of the date the referee decision is mailed.<sup>16</sup> Though it is not required, it is generally good practice to submit a written summary statement or brief on behalf of your client should there be an appeal to the Commission. The brief should include a summary of the testimony and evidence entered (or attempted to be entered) into the record during the appeal hearing, the standard of review and an argument why the referee's ruling was correct or incorrect.

The Commission has significant discretion. It can affirm, modify, set aside or reverse a referee decision.<sup>17</sup> It can order a new hearing or direct the taking of additional evidence.<sup>18</sup> However, the Commission's decision is primarily confined to "evidence previ-

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ously submitted” to the referee in the original appeal hearing.<sup>19</sup>

This is a major strength if your client won the initial hearing, but can be a major problem otherwise. If your client is the one appealing to the Commission, requesting a new hearing is generally the strongest tactic. Alternatively, you can argue that the referee ruled contrary to the evidence presented. Considering the low “preponderance of credible evidence” standard, a full reversal on this basis is unlikely.

The Commission is the ultimate administrative authority when it comes to Kentucky unemployment benefits. However, that doesn’t mean the battle is necessarily over once the Commission rules. In most cases, judicial review is available in the Circuit Court where the claimant was last employed.<sup>20</sup> Judicial review of a Commission decision is greatly accelerated compared to a usual state civil suit. A complaint must be filed within twenty days, to which an answer is due within twenty days.<sup>21</sup>

Judicial review of a Commission ruling “is governed by the general rule applicable to administrative actions,” which means that “[i]f there is substantial evidence in the record to support an agency’s findings, the findings will be upheld, even though there may be conflicting evidence in the record.”<sup>22</sup> The judgment of the Circuit Court can be further appealed to the Kentucky Court of Appeals.<sup>23</sup>

Like the Commission before it, judicial review is generally restricted to the record established by the referee. This is why the initial appeal hearing is critical. Effectively screening your client, fully preparing for the hearing (including prepping witnesses if relevant and available), and conducting the hearing as seriously as one would a trial is often a recipe for ultimate success. Effective counsel can preserve a favorable ruling under the deferential

appellate standard of administrative law. Even if the initial hearing results in a loss, knowing the law and presenting a strong claim can help overturn an erroneous referee ruling.

Kentucky workers filed an average of 164,000 claims for unemployment benefits in each year from 2011 to 2013.<sup>24</sup> During that same time period, an average of 47,000 were denied those benefits, many due to employer protests.<sup>25</sup> Thousands of those denials are reversed each year through the appeals process. Though that process is confusing and intimidating, a knowledgeable advocate can help a claimant overcome the low rate of reversal and secure the unemployment benefits they deserve.



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1 KRS 341.370(3), 787 KAR 1:070.

2 Commonwealth of Kentucky Unemployment Insurance Trust Fund Annual Report CY2013, pg. 11.

3 *Ibid.*

4 Commonwealth of Kentucky Unemployment Insurance Trust Fund Annual Report CY2012, pg. 11. The rate of employer protests was down in 2013 compared to 2012, during which employers protested 50 percent of all new claims.

5 KRS 341.370(1)(b).

6 *Masonic Homes v. Unemployment Insurance Commission*, 382 S.W.3d 884, 886-887 (Ky. Ct. App. 2012), quoting *Burch v. Taylor Drug Store*, 965 S.W.2d 830, 835 (Ky. Ct. App. 1998). See also, *Shamrock Coal Co. v. Taylor*, 697 S.W.2d 952, 954-55 (1985)).

7 KRS 341.370(6). However, “a willful or wanton, or bad faith, finding is not an additional requirement when the employee is discharged for conduct specifically identified in KRS 341.370(6).” *Ky. Unemployment Insurance Commission v. Cecil*, 381 S.W.3d 238, 247 (Ky. 2012).

8 KRS 341.420(2).

9 *Burch*, 965 S.W.2d at 835.

10 *Brown Hotel v. Edwards*, 365 S.W.2d 299, 301 (Ky. 1962).

11 For example, emphasize your client’s clean disciplinary record and use questions to reaffirm that she understands the purpose of workplace rules and that she worked to promote the employer’s interests.

12 *Müller v. Unemployment Insurance Commission*, 425 S.W.3d 92, 97 (Ky. Ct. App. 2013), KRS 341.420(4).

13 Screening clients is just as important in unemployment benefits appeals as in any other area of the law. Avoid clients whose stories are inconsistent or whose explanations for their termination are suspect.

14 Commonwealth of Kentucky Unemployment Insurance Trust Fund Annual Report CY2013, pg. 11. Of 20,851 total reported appeal decisions, claimants won 5,175 of 17,418 claimant appeals, while employers won 1,058 of 3,433 employer appeals.

15 Commonwealth of Kentucky Unemployment Insurance Trust Fund Annual Report CY2012, pg. 11.

16 KRS 341.420(4).

17 KRS 341.430(1).

18 *Ibid.*

19 *Ibid.*

20 KRS 341.450(1).

21 KRS 341.450(1) and (2). Note that the claimant, employer, and the Commission must each be named as parties.

22 *Cecil*, 381 S.W.3d at 245-46, citing *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981). Further, “[a]n agency’s findings are clearly erroneous if arbitrary or unsupported by substantial evidence in the record. If the reviewing court concludes the rule of law was correctly applied to facts supported by substantial evidence, the final order of the agency must be affirmed.” *Id.*, internal citations omitted.

23 KRS 341.450(4).

24 Commonwealth of Kentucky Unemployment Insurance Trust Fund Annual Report CY2013, pg. 11; Commonwealth of Kentucky Unemployment Insurance Trust Fund Annual Report CY2012, pg. 11; Commonwealth of Kentucky Unemployment Insurance Trust Fund Annual Report CY2011, pg. 10.

25 *Ibid.*

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