
SERVICE BULLETIN

Unemployment Appeals Hearings, Learning the Hard Way

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Sometimes lessons can be learned by observing mistakes made by other companies. With respect to unemployment appeals hearings, many things can go wrong, regardless of the merits of the case, preventing a company from securing a favorable decision. Recently I read a ruling by the Court of Special Appeals of Maryland, relating to an unemployment claim mishap for the employer.

In this case (*Michelle Parham v. Department of Labor, Licensing & Registration, et al*), the claimant worked for Mid Atlantic Baking Company (not a client of our company) for less than three months. She missed three days of work (March 5, April 11, and April 12). On April 14 she returned to work. The manager on duty, Barbara Wolferman, asked to see her. The substance of this conversation, which is the heart of the matter, is disputed. When the conversation ended, Ms. Parham left the building and did not contact Mid Atlantic again.

The initial claim determination approved the claim, holding that Ms. Parham had been discharged, and that insufficient information had been presented to show that her actions constituted misconduct in connection with the work. The company appealed, and a hearing was conducted. During the hearing, the company presented two witnesses: the Human Resources Coordinator and the Plant Manager. The Human Resources Coordinator, Erica Stokes, testified that Parham quit because she walked out without punching out on April 14th, after the fateful meeting with Ms. Wolferman. The Plant Manager, Donald Kauffman, testified that he learned of the incident on April 15th. He said:

[T]hat next day when I came to work, the 15th, that's when [Wolferman] had told me that [Parham] had come into work, and that she had words with her saying that she did not, you know, like what was, you know, she had discussed the absenteeism of the 11th and 12th with her, and she wasn't happy with that.

So [Wolferman] wrote her up and wanted [Parham] to sign it. She refused. There's no signature on the write-up. She refused to sign it. At that point, [Parham] had left the building. She didn't even punch out. She just left the building and she was instructed that she needed to talk to me before she came back to work.

Parham's testimony at the hearing directly contradicted Stokes and Kauffman's testimony that she was told to call Kauffman. Parham testified:

Barbara told me that I had to call out and Don said I couldn't operate so she had to let me go. So I just left. What was I supposed to do - stand there and disrespect the lady or argue with her? I had to leave the building.

She also stated, "No one told me to call anyone. [Wolferman] just told me to leave the building. That was that."

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The conversation between Parham and Wolferman is of singular importance. Parham is present at the hearing, offering first-hand testimony. Wolferman is not present at the hearing, so the company's testimony regarding the conversation is hearsay. The court found that the company's hearsay testimony that Wolferman told Parham to call the Plant Manager on April 14th did not constitute competent, material, and substantial evidence. Therefore, the court found that Parham was discharged, that no misconduct was established, and that the claim should be approved.

It would appear that Mid Atlantic shot itself in the foot by not presenting Barbara Wolferman as a witness at the hearing. There may have been a good reason for Wolferman's failure to attend, but it was never explained by the company.

There are several reasons why a first-hand witness does not testify at an unemployment hearing. First, some companies have the mistaken point of view that a Human Resources representative should explain the company's position and not involve other witnesses. Secondly, it is not always obvious, except in hindsight, who the key witness will be, and not enough consideration is given to this before the hearing. Thirdly, the key witness may have left the company or otherwise became unavailable by the time the hearing is conducted. Further, the company officials may have the opinion that the key witness would be a liability at the hearing, because of inexperience, temperament, or other reasons. Finally, there may be concern that testimony presented during the appeals hearing could be used against the company in some other matter, unrelated to the unemployment claim. Some concerns may be legitimate, but the fact remains that Mid Atlantic lost the unemployment case because the first-hand witness was not present.

You may have to weigh the potential adverse consequences of having a particular person testify against the potential cost of an adverse hearing decision if the person does not testify. In estimating the potential cost of an unemployment claim, first consider the potential benefit charges. We can help you estimate the charges if the UI agency has not given you this information. Secondly, you could estimate the total cost to the company, in terms of future UI tax payments, at 1.3 times the potential benefit charges. Thus, a UI claim with potential benefit charges of \$8,000 could increase the company's future UI taxes by an estimated \$10,400 over several years.

In the decision-making process, you should consider whether there was a pivotal final event that triggered the termination of the employee. If so, you should anticipate that the hearing examiner's decision will give such an event or incident great weight. Don't weaken your case by failing to offer the testimony of a first-hand witness unless other considerations outweigh the importance of the unemployment claim.

In the Michelle Parham case, this person worked less than three months for Mid Atlantic, so their potential benefit charges were probably small and the impact on their UI taxes was probably limited. Perhaps this was an inexpensive lesson.