

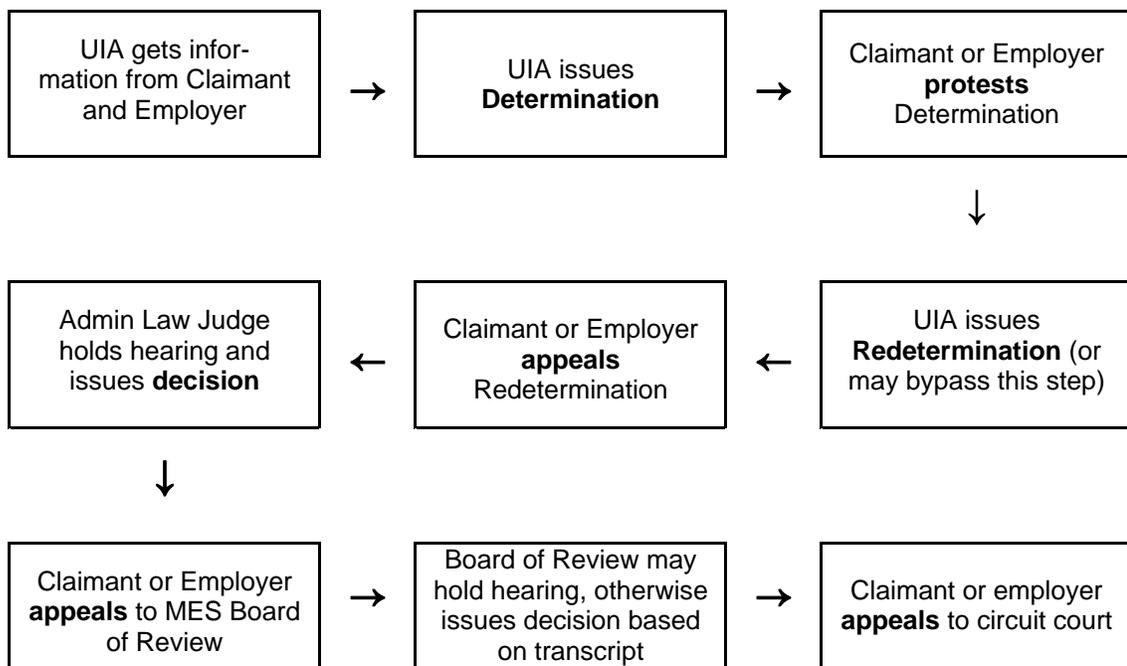


DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH  
**UNEMPLOYMENT INSURANCE AGENCY**

Statewide Employer Seminars  
Breakout Session 3:  
**HOW THE BENEFIT APPEALS SYSTEM WORKS**

Fall 2009

■ **OVERVIEW OF THE APPEAL PROCESS**



■ **WHY IT IS IMPORTANT TO ATTEND AN ADMINISTRATIVE LAW HEARING**

● The Administrative Law Hearing is *De Novo*

The Administrative Law hearing is a ***de novo* hearing**, meaning that none of the documents previously given to the UA branch office will be considered by the Administrative Law Judge (ALJ) in reaching his/her decision.

- ✓ The ALJ takes **testimony** under oath. The ALJ applies the **rules of evidence**, similar to the way they are applied in a court of law.
- ✓ Each party gives direct testimony, and is subject to cross-examination.
- ✓ If the party with the appealing party does not appear at the hearing, the appeal will be dismissed for “lack of prosecution.”
- ✓ If the party with the burden of proof does not appear at the hearing, the appeal could only be won if the other party makes a “mea culpa” statement.
- ✓ If the party with the burden of proof makes certain statements to meet that burden, the opposing party would wish to be present to respond to those statements, and to cross-examine those statement.

● Review by Board of Review is Limited

In most cases, the Board of Review reviews only the transcript of the audiotape made at the Referee hearing. In most cases, there will not even be a hearing before the Board of Review, but if there is, only points of law will be open for discussion, generally not the facts of the case. Written argument is permitted only in cases where both sides are represented, or both sides agree to permit written argument, or the Board requests it.

## ■ EFFECTIVE PREPARATION FOR A HEARING

- Preparation Before A Claim is Filed

- ✓ Have a Written Disciplinary Policy
- ✓ Maintain a clear, up-to-date, reasonable employer policy describing unacceptable behaviors. Include a clear, corrective disciplinary procedure. Maintain evidence of distribution and explanation of the policy to the claimant. Make sure supervisors are trained in using the disciplinary policy.
- ✓ In addition to disciplinary policies, employers have policies that cover such areas as work rules, attendance, sexual harassment, leaves of absence, and so on.

- ✓ Follow the Established Disciplinary Process

In the disciplinary process, give clear and specific statements of unacceptable conduct, an indication of which rule was violated and how, and an indication of the consequences of future violations. Make sure the discipline reasonably fits the offense.

Avoid condonation of behavior from some employees but not from others, or from a single employee over a period of time.

- ✓ Document Infractions of Policy

- Document attendance (absence and tardiness);
- Document incidents of conduct contrary to policies and rules.
- Document warnings and other types of discipline, including the names of supervisors and/or witnesses knowledgeable about the incident(s).

- Respond to UIA When A Monetary Determination is Issued or Information is Requested
  - ✓ Respond to UIA request for information about the worker's separation from employment, if requested. It will be requested only where the UIA needs the information to know whether benefits are payable. Respond to the request within 10 days from date of mailing of the request.
  - ✓ Give complete information as to the facts involved.
    - Do not merely give conclusions (e.g. "Claimant was discharged for misconduct.") Give dates of incidents and indicate what warnings and other progressive discipline was used.
    - Be complete in detailing the reasons for discharge, because an incomplete statement could lead to initial non-disqualification, and once payments begin, they will continue unless/until a redetermination reverses the payments.
  - ✓ **Even if separation information is not requested by the UIA because benefits are payable due to subsequent rework, if the employer believes the separation would have been disqualifying if the UIA had needed to adjudicate the separation, then the employer should provide that information in response to the Monetary Determination so the employer's account could be non-charged for the benefits.**
- Prepare For the Hearing Itself
  - ✓ Exercise protest/appeal rights
  - ✓ Consider contacting an Advocate (800-638-3994), Agent, or Attorney
  - ✓ Read the Notice of Hearing to learn the issue(s) to be discussed at the hearing and about the rights of the parties
  - ✓ Consider requesting a telephone hearing
  - ✓ Know who has the burden of proof
  - ✓ Know what has to be proved
  - ✓ Review your file and UIA's file before the hearing

- ✓ Take the right witnesses and documents to the hearing
- ✓ Arrive at the hearing on time and sign in

## ■ WHAT HAPPENS AT AN ADMINISTRATIVE LAW HEARING

- Finding Jurisdiction

The ALJ determines whether he/she has legal authority (called jurisdiction) to hear the case. For example, if the appeal to the ALJ was late, the ALJ lacks authority to hear the case.

- Defining the Issues(s)

The ALJ decides what issue(s) are before him/her for consideration. Generally, the issues are defined by the UA Branch Office in the Determination they issue.

- Presenting Evidence The claimant and employer present *information*, to the ALJ. They do this:

- ✓ In the form of statements, under oath, at the hearing (called “testimony”) or in the form of documents supported by testimony
- ✓ In the form of answers to questions of the other party (called “cross-examining”)

- Making Findings of Facts

The ALJ considers all the information and determines what is reliable and credible and what is not, and makes “findings of facts”.

- Citing Applicable Provisions of Law

The ALJ cites the Section of the *Michigan Employment Security Act* that applies to the case.

- Concluding Whether Party with *Burden of Proof* has Met that Burden

The ALJ decides whether the party with the burden of proof has won their case by meeting that burden by a preponderance of the evidence.

## ■ HOW TO MEET, OR RESPOND TO, THE BURDEN OF PROOF

When a claimant files a new claim for benefits, or renews an existing claim, the UIA must investigate the reason the claimant has become unemployed. The most common reasons are discussed here.

- Voluntary leaving without good cause attributable to the employer  
In general, if a worker leaves a job voluntarily, the worker will be disqualified from receiving benefits. To avoid disqualification, the claimant must meet their burden of proof to show either of the following:

- ✓ that they had good cause attributable to the employer for leaving the work voluntarily , or
- ✓ that the leaving was “involuntary”

Good Cause attributable to the employer could include, for example, consistently bouncing paychecks, or unsafe working conditions. If the claimant notified the employer of these circumstances to give the employer an opportunity to correct them, and they were not corrected, the claimant will not be disqualified if they left the job for such reasons.

Although the burden of proof in this case is upon the claimant, the employer will want to be present at the hearing to challenge, if appropriate, the claimant’s statements by which they attempt to meet their burden of proof.

The law creates certain other exceptions to a disqualification for voluntarily leaving a job. The claimant will not be disqualified if:

- ✓ the claimant, during a benefit year, left a job that was unsuitable, and did so following a trial period of not more than 60 days;
  - ✓ the claimant left work after accepting permanent, full-time work with another employer and actually worked for the new employer
  - ✓ the claimant left work because their military spouse was transferred by the military to another geographic location.
- Misconduct in connection with the work, or intoxication at work

The burden of proof for a discharge from employment is on the employer.

The Michigan Supreme Court has defined “misconduct,” for the purpose of an unemployment compensation case, as follows:

*"... conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the [unemployment compensation] statute."*

### **What “misconduct” IS**

“Misconduct” is limited to conduct evincing such willful or wanton disregard of an employer’s interest as is found:

- ✓ in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his/her employee, or
- ✓ in carelessness or negligence of such degree or recurrence as to
  - ★ manifest culpability, wrongful intent or evil design, or
  - ★ show an intentional and substantial disregard of
    - the employer’s interests, or
    - the employee’s duties and obligations to his/her employer.

### **What “misconduct” IS NOT**

- ✓ Mere inefficiency
- ✓ Unsatisfactory conduct
- ✓ Failure in good performance due to inability
- ✓ Failure in good performance due to incapacity
- ✓ Inadvertencies
- ✓ Ordinary negligence in isolated instances
- ✓ Good faith errors in judgment or discretion

### **Cases dealing with “misconduct”**

- ✓ A good reason to discharge an employee may not be the same as "misconduct" for the purpose of disqualification for unemployment benefits. (*Linski v Employment Security Commission*)
- ✓ Exercise of bad judgment will not necessarily be misconduct. (*Streeter v River Rouge Board of Education*)
- ✓ A series of incidents can result in disqualification, even though none of the incidents, alone, would have been disqualifying. (*Giddens v Employment Security Commission*)
- Once the employer submits evidence of unsubstantiated or excessive attendance infractions, the burden shifts back to the claimant to provide a legitimate explanation for them. (*Veterans Thrift Stores v Krause*)
- ✓ The final incident in a series, however, must show some degree of culpability. (*Washington v Amway Grand Plaza*)
- ✓ Violation of an employer's rules may be disqualifying. (*City of Saginaw v Nancy A. Lindquist and MESC*) (*Rasmus v Kirkhof Transformer and MESC*)
- ✓ Non-intentional acts of claimant can be misconduct if the consequences are, or could have been, severe enough. (*Bell v MESC; Reynolds v Mueller Brass*)

### **Cases dealing with “connection with the work”**

- ✓ Falsification of a job application may be disqualifying, if the employee would not have been hired if the true information had been provided. (*Lipshaw Manufacturing Co. v Richard Kohman and MESC*)
- ✓ The employer must demonstrate that the misconduct occurred "in connection with the work." (*Frigo Cheese v Osepchook; Banks v Ford Motor Company; Hofsommer v Macauley's; Saugatuck Village v Bosma; Bowns v City of Port Huron*)

- Intoxication at work

The employer would have the burden of showing that the worker's work performance was affected, and that the apparent cause was consumption of alcohol.

- Drug Offenses

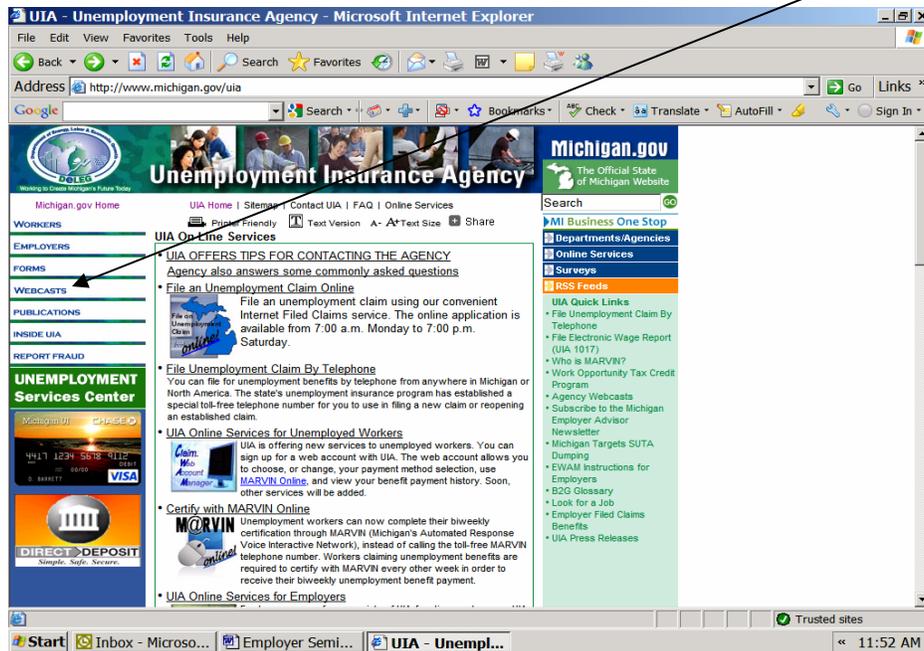
A worker will be denied unemployment benefits if the worker is discharged for any of the following:

- ✓ Failing a drug test
- ✓ Refusing to take a drug test
- ✓ Using or possessing a controlled substance at the workplace

The test must be administered in a non-discriminatory manner. A confirmatory test must be given, if requested by the claimant.

■ **FOR MORE INFORMATION...**

Check out the UIA's "UI Tube" on the UIA's website. Go to the UIA Homepage at [www.michigan.gov/ui](http://www.michigan.gov/ui). From there, look along the left side for "Webcasts."



Click on "Webcasts" and that will take you to the "Webcasts" page. Scroll down to "Employer Webcasts." Click on that and you will see a series of available Webcasts. Check out the Webcast entitled *Appeals Process – Tips for Employers*.