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The Risks and Rewards of Defending Unemployment Claims

By Aaron J. Graf

A common dilemma faced by employers is the defense of both an unemployment claim now and the possibility of a future discrimination claim by the same former employee down the road. Contesting a questionable unemployment claim has obvious rewards, such as keeping costs down and discouraging future questionable unemployment claims. However, if an employer is not cautious in defending an unemployment claim, it may also expose itself to some risks in a future discrimination claim.

One of the reasons employers can find themselves in trouble in their defense of an unemployment claim is the different speeds at which unemployment and discrimination claims move. Employees typically have 300 days to file a discrimination complaint with the appropriate agency while they may very well be at the unemployment office the day after they are terminated. In spite of the unemployment claim coming first, and possibly setting precedent for how any future discrimination claim may play out, it typically receives far less attention and resources.

Employers must be wary of the pitfalls that develop when an employee files both an unemployment claim and a discrimination claim. In evaluating whether a future discrimination claim is likely, the employer should consider the following:

- Did the employee indicate that they would file a discrimination complaint?
- Were there any significant employment events involving the employee in the past year prior to termination? Was the employee demoted, transferred, or otherwise disciplined? Did the employee make any internal complaints regarding their treatment?
- Was the employee a malcontent during his or her employment? Has the employee filed any previous discrimination claims? Was the employee unusually hostile concerning his or her termination?
- Is the employee a member of a protected class, especially one that may be considered to be underrepresented in the company (e.g. he is over 40 years old and the majority of the company's workforce is under the age of 40)?
- What are the likely claims to be asserted and what defenses will be asserted?

A review of these factors will typically give the employer a good idea as to whether the former employee is likely to file a discrimination claim in the future. (Of course, no such information should be used to retaliate against the former employee in any way.)

If the employer believes a future discrimination claim is likely, it should account for that when deciding whether and how to contest the unemployment claim. If an employer chooses to contest, it will typically submit materials supporting its position, including documents from an employee's personnel file regarding the employee's performance history, discipline record, and/or termination. In addition, the employer will succinctly state its theory as to why the employee should be denied unemployment benefits. This often involves an assertion that the employee was fired for misconduct.

Either party is typically entitled to appeal the initial decision on the unemployment claim and if that happens then the matter proceeds to a hearing before an administrative law judge. It is during this appeal process that the employer must be especially wary. While it is typically true that no determination, decision, or judgment made during the unemployment proceeding is admissible or binding in any future discrimination claim (see, for example, Wis. Stat. §108.01), sworn testimony during an unemployment proceeding could potentially be used in a future proceeding. Thus, an employer must be cautious not to bind itself to a certain theory of the case that may later be contradicted in the defense of the discrimination claim. Such conflicting testimony impedes the ability to defend a future discrimination claim because contradicting testimony can give rise to an inference that the reasons the employer provided for its employment decisions were merely pretext for discrimination.

For example, an employer that had not conducted a

thorough investigation when approaching the defense of an unemployment claim may unequivocally testify, based on available information, that the sole reason it fired the employee was for his insubordination to a supervisor. Of course, at the time such a statement would seem to support the unemployment claim and would not seem to be significant. However, during the more detailed investigation of the future discrimination complaint it may be discovered that the reason was more complex and that multiple factors were considered, such as performance issues, which set the terminated employee apart from other employees who may have been insubordinate but were not terminated. Typically, as to the discrimination claim, defense counsel would argue that the employee was not terminated solely for insubordination but rather was terminated for the host of performance issues. However, if the employer has already stated unequivocally and under oath that the employee was terminated for insubordination and nothing else, then the defense on the discrimination claim may be hamstrung by the conflicting testimony. Thus it is crucially important to conduct an investigation of the employee's history and performance issues, and the reasons behind the termination in advance of the unemployment hearing.

An employer must also keep in mind that during this initial investigation it is important to be thorough:

- First, if possible, the individual conducting the initial investigation should not be the decision maker regarding the termination. This will eliminate any chance that the investigation may be less than thorough if there are questionable circumstances surrounding the termination.
- Second, when conducting the investigation, the employer should do more than simply speak with the decision makers involved and should dig deeper rather than simply accepting an answer of "no" on its face. Often, an employee's supervisors, due to mere human nature, may attempt to sugarcoat a less-than-favorable situation, especially if the supervisor feels it reflects poorly on him or her in any way. Unfortunately, the sugar-coated version may be insufficiently accurate, as a later thorough review of the documentary evidence reveals. Thus, it is important to get to the honest truth of the matter from the start.
- Third, the employer should keep in mind that if discrimination is suspected during the course of the investigation, it is too late to prevent that particular discrimination. There is no point in trying to put a positive slant on the investigation or attempting to protect individuals who may have participated in the possible discrimination. Rather, it is in the employer's best interest to gather all information possible and conduct an honest analysis of the information so that a consistent reason for the termination is determined. If discrimination is believed to have occurred, take the appropriate disciplinary and remedial steps as to those involved in the discrimination and gather and preserve all evidence relevant to the possible future claim so that

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the defense of the possible claim has the highest chance of success.

Thus, by analyzing whether a discrimination complaint is likely to follow, conducting a thorough investigation into the employee's history and termination, and developing a consistent and sound reason for the termination that can be used in both contexts, an employer can better the chances that the rewards of defending an unemployment claim outweigh any risks.

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