

Strategies for Defending Unemployment Claims

Sarah K. Franklin
Maggie A. Hanson
Davis Brown Law Firm



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

Discipline Considerations

1. Progressive discipline. If you have it, you must follow it.
2. Timeliness of discipline – inform employee of problems in a timely fashion.
3. Written warnings.
4. Suspension or probation.
5. Acceleration of disciplinary problems.
6. Termination.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

Making the Termination Decision

1. *Plan ahead:* Create a termination checklist.
2. Avoid panic responses to any individualized circumstance.
3. Involve someone who is not directly connected with the employee.
4. Give the employee the opportunity to tell his or her side of the story.
This can be important to the fact finders and ALJ.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

5. Conduct a complete investigation including gathering all appropriate documentation.
 - Employee personnel file, including application and reference information.
 - All existing supervisory and work files regarding the employee.
 - All worker's compensation information.
 - All grievance forms.
 - All disciplinary actions and responses.
 - All performance appraisals.
 - All investigatory files and procedures.
 - All testing and credential files.
 - Job descriptions.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

6. Determine whether the employee falls into any protected category – age, race, sex, color, physical/mental disability of the employee or employee family member, national origin or religion.
7. Determine whether any circumstances exist which could potentially complicate the termination – substance abuse treatment, contract claims, defamatory comments by supervisors, confidentiality issues.
8. Verify that the termination is close in time to the act of misconduct.
 - [Milligan v. Employment Appeal Board](#), 208 N.W.2d 238 (June 15, 2011) (unpublished).



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

9. Verify that the termination decision is consistent with other decisions which have been made by the company.
 - Always stress this fact in fact-finding interviews and hearings before the ALJ.
10. Verify that all applicable employer policies have been followed, both in substantive requirements and procedural requirements. Internal review by more than one supervisor, including the Human Resources Director, should be provided to ensure compliance with policy and law.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

Document the Investigation and Termination

1. *The 6 C's of Good Documentation.*
 - Clear
 - Contemporaneous
 - Concrete
 - Concise
 - Consistent
 - Complete



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

Conducting the Termination Interview

1. Identify all people who should be involved in the termination interview:
Minimum of two people, including the employee's immediate supervisor.
2. Make a determination as to whether or not the employee is entitled to representation at the termination meeting.
3. Make an outline of the termination discussion and stick to the outline.
4. Do not argue, bargain or apologize.
5. Conduct the termination in a private and confidential manner.
6. Determine whether or not a separation agreement with release would be appropriate.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Terminations: A Successful Defense Starts Here

7. Prepare separation documentation including separation agreements, COBRA documentation, and a termination letter if one is to be provided.
8. Determine what, if any, notice will be given the employee prior to the employee being required to leave company premises.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

A Multi-Layered Process

1. Initial claim for unemployment compensation benefits.
 - Employer will receive a Notice of Claim (Form 65-5317)
2. Contest by the employer.
3. Initial fact-finding interview.
4. Appeal to an Administrative Law Judge if either party dissatisfied.
 - Notice of Appeal and Hearing (Form 65-5514)
5. Appeal to the Employment Appeal Board if either party dissatisfied.
6. Petition for Judicial Review to the Iowa District Court if either party dissatisfied.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Evaluate early on whether you should contest the claim, and remember the burden.

- It is the purpose of unemployment compensation to give terminated employees benefits and the burden of proof regarding termination rests primarily on the employer.
- The worker (claimant) has the burden of proving eligibility for benefits regarding the following conditions:
 - voluntary quitting
 - being able to work
 - being available for work
 - earnestly and actively seeking work
 - second benefit year requalification.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- The employee does not have to prove that he or she was an adequate employee. The mere fact that the employee was employed is enough to qualify employees for benefits.
- Except when an employee has voluntarily quit, the employer must prove that the employee engaged in misconduct or other prohibited actions in order to win an unemployment compensation hearing. This burden of proof is fairly high, and preparation for the hearings is critical for any employer.
- If an employer is dissatisfied with the employee's performance, that employer may discharge the employee. However, under Iowa law, those actions may not constitute misconduct or disqualify the employee from benefits.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Disqualification from Benefits

- A claimant may be disqualified from receiving benefits for any of the following reasons:
 - Voluntary quit of a job without good cause attributable to the employer.
 - Refusal of suitable work or recall by a former employer.
 - Discharge for work-connected misconduct.
 - Discharge for gross misconduct.
 - Failure to adequately search for a job.
 - Unavailability for a job.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- Physical inability to work.
- Setting unrealistic limitations on acceptable jobs, such as excessive wages, only part-time work, unusual hours or only certain jobs.
- Receiving benefits from another state's unemployment insurance fund.
- Receiving other compensation in excess of weekly benefit amount.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Misconduct

Examples of Misconduct:

- **Excessive unexcused absenteeism** is an intentional disregard of the duty owed to the employer and is considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.
- When a **willful and deliberate false statement is made on an application** for work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification is an act of misconduct.
- **Past acts of misconduct** may be relevant to show the magnitude of the present act of misconduct. The ALJs also appear to find the fact that an employee had previously been reprimanded as relevant to the present act of misconduct.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Fact-Finding Interviews: The First Stage in a Multi-Layered Appeal Process

- An employer's protest is the basis for a fact-finding interview.
 - Be sure to sign all papers as there is no extension of the ten-day protest period if an employer fails to sign the notice.
 - Failure to timely file the protest may prevent the employer from protesting a legitimate disqualification of the claimant and result in the employer being charged for benefits for that employee.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- **Notice of fact-finding interview.** This form will notify the claimant and employer of a scheduled time and place for the interview. Each party has the right to request a telephone or in-person interview when returning the employer's statement of facts on the Notice of Claim.
 - If the employer is unable to attend as scheduled, telephone the IWD office immediately to make necessary arrangements for furnishing the pertinent information.
 - The employer may ask for a continuance; however, the local IWD office has the discretion to deny that request. Do not expect a continuance. Be prepared to attend the interview or submit evidence.
 - If the employer fails to attend the interview or to provide an explanation of the matters at issue, a decision will be made on the facts available.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- Plan to attend proceedings to develop the factual record and protect the employer's interests.
- These can usually be handled by the employer. However, should there be any likelihood that the terminated employee anticipates filing or has filed a civil rights complaint under Iowa or federal law or a wrongful discharge claim, counsel should be consulted immediately.
- Do not allege misconduct if none exists.
- Mere inefficiency, unsatisfactory conduct, failure in good performance as a result of an inability or incapacity, inadvertencies and ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not misconduct within the meaning of the statute.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

What to Expect in a Fact-Finding Interview

- This is an informal meeting between the employer, the claimant, and the IWD representative.
- The IWD representative will ask questions of both parties and give each an opportunity to explain their positions on the issues.
- Both parties may present witnesses and evidence during the interview.
- Within a few days of the interview, both parties will receive a copy of the decision regarding claimant's eligibility to receive unemployment benefits.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Suggestions for Participation in Fact-Finding Interviews

- Be familiar with the facts of the case and the reasons for separation from employment. Be prepared to respond to questions regarding the employee's start date, last date worked, job title and hours worked.
- Where feasible, have witnesses and/or witness statements to support your position.
- Submit any other relevant documentation such as dates of employment and separation, employee evaluations, notices of disciplinary action, job descriptions and relevant employee handbook provisions and policies, and names of other individuals with personal knowledge of the action.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Appealing the Fact-Finding Decision

- If either party does not agree with the initial determination, it may be appealed to the next level, a hearing before an Administrative Law Judge ("ALJ").
- The fact-finder's decision will include instructions on how to file an appeal and appeal rights for both employer and claimant.
- The appeal must be post-marked or received in the appeals section of IWD within 10 days of the date of mailing shown on the fact-finder's decision. Failure to meet this deadline may bar the employer from appealing the decision and may result in the employer being charged for benefits for this employee.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- The notice of appeal must include the following:
 - the name, address, and social security number of the claimant.
 - a reference to the decision from which the appeal is taken.
 - the fact that an appeal from such decision is being made.
 - the grounds upon which the appeal is based.
- A party may subpoena witnesses or records for the hearing. Such a request shall include:
 - the reason why the party wishes to subpoena witnesses or records.
 - the name, address, and telephone number of each witness or custodian of the records.
 - the telephone number of the person requesting the subpoena.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- Where there is a request to subpoena witnesses or records, usually a separate hearing will be held on this matter. Any ruling on these requests can be appealed prior to the benefits hearing.
- Administrative rules allow for written discovery and a short response time. Consider whether interrogatories or requests for production of documents are necessary.
- If you receive discovery from the other side consider whether this implicates HIPAA or other laws thus requiring a protective order



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

The Hearing Before the ALJ

- IWD will send a notice of hearing to all interested parties to the appeal at least seven days before the date of the hearing.
- Either party may request an in person hearing. If an in person hearing is not requested, a telephonic hearing will be held. In person hearings in areas outside of Des Moines will take longer to be scheduled.
- Evidentiary exhibits should be served on the other party, IWD, and witnesses in remote locations, sufficiently in advance of the hearing.
- Remember that hearings before the ALJ are recorded and are public record available to the news media and others. Therefore this critical factor should be considered when evaluating whether or not to appeal a decision in favor of the employee.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

What to Expect at the Hearing:

- The purpose of the hearing is to give both parties the opportunity to present all relevant facts surrounding the termination of employment for which the claimant is claiming benefits.
- Participants in the hearing include the employer and claimant, as well as any witnesses which either party wishes to call to support the factual allegations of the claim.
- IWD may issue subpoenas to compel the attendance of witnesses.
- The hearing officer's responsibility is to inquire fully into the matters at issue and to receive into evidence the testimony of witnesses and any documents which are relevant and material to the matters.
- Normally the hearing is closed on the date of the hearing. Either party may request that the record be held open in order to submit documents.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Evidence at the hearing:

- The employer should submit all relevant documents, which may include but are not limited to:
 - employee evaluations
 - job descriptions
 - employee handbooks
 - time records
 - disciplinary actions
 - affidavits of individuals unable to attend the hearing.
- Both parties are required to provide IWD and the opposing party with a copy of the documents it wishes to present at the hearing. Be sure to offer the documents into evidence at the hearing as this is usually the last opportunity to do so.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

New issues raised at the hearing:

- Where an entirely new issue is raised at the hearing by a party, the hearing officer will announce his or her willingness to take testimony on the new issues.
- The parties can object to the new issue and ask the ALJ to adjourn the hearing and consult counsel.
- If the parties waive their right to notice and make no other objection, the hearing officer will proceed with the new evidence/issue.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Format of Hearing:

- The hearing officer usually gives a brief opening statement outlining the history of the case, names of the parties, the issues involved, the appeal rights of the parties, what matters, if any, will be officially noticed, and those parts of the file pertinent to the hearing.
- The ALJ will usually begin the questioning by asking for the employee's hire date, position worked, last day worked and the reason for the employee's separation from employment.
- Each party will be permitted to offer evidence and testimony and ask questions to the opposing party's witnesses.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Suggestions for Participation in the Hearing Before the ALJ

- Be on time and be prepared.
- Make an outline of the case for reference and be familiar with the facts. Know the location of materials in the file to avoid searching and fumbling for the documents.
- Make an outline of questions to ask the employee. These questions should be used to illustrate inconsistencies in the employee's testimony.
- Stick to the facts and avoid conclusions.
- Do not interrupt the person testifying. If the statements are incorrect, make a note of them because the employer will have a chance later to correct them.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- Do not be argumentative. Ask questions of the other party and witnesses that will establish your case. If stories change, pursue with more questions.
- If you do not understand a question being asked by the IWD representative or ALJ, or do not understand legal jargon being used, say so.
- At an in person hearing, if you bring exhibits with you to the hearing, have enough copies to give to the opposing party and the ALJ.
- At telephonic hearing, submit all evidence a minimum of three days before the hearing. Mark documents for easy reference.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- Your last chance to get evidence into the record is at the hearing before the ALJ. Do not "save" evidence to use later. No new evidence can be admitted after the appeal hearing unless you can convince the decision maker that you need a remand for more evidence and you can give a good reason as to why it was not previously given.
- If you do not know something, simply say so. Do not assume that because someone asks you a question, you are expected know the answer. Sometimes the right answer is "I don't know."



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

- When asked if there are any further comments before the record is closed, you may make a closing statement of the facts and quote the pertinent law, section, or rule if you know it.
- Although most IWD representatives will attempt to develop the record fully for either side, the role of the ALJ is to be judge and not to investigate. Therefore, it is up to you to come forward with the facts so that a decision can be made on all available facts. Do not hesitate to request time to testify and submit relevant information even if not specifically asked to do so by the hearing officer.

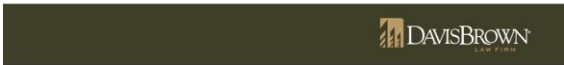


©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Appeal to the Employment Appeal Board

- If either party is dissatisfied with the decision of the ALJ, the decision can be appealed to the Employment Appeal Board. (Form 60-0169)
- After the claim is acknowledged, a disk containing an audio copy of the hearing is provided to the parties approximately 6-8 weeks later.
- Written briefs including arguments of the law and facts supported by citations to the transcript are accepted within seven days from the date the transcript is sent out.
- An additional seven day extension will be granted as a matter of course if requested in writing and additional time may be granted under certain circumstances.
- No new evidence relating to the claim may be introduced unless good cause exists as to why the evidence was not submitted to the ALJ.



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.

Unemployment Compensation Claims

Petition for Judicial Review to the Iowa District Court

- If either party is dissatisfied, a petition may be filed with the District Court asking the Court to review and reverse the decision of the Employment Appeal Board.
- A complete record will be prepared of all of the proceedings at the Agency level.
- Written briefs will be presented to the Court and an oral argument may be requested. The District Court Judge will then issue a ruling.



Unemployment Appeal Exhibit Checklist

- ✓ Job description
- ✓ Employee handbook addressing provisions relevant to the claimant's separation from employment (be sure to include signature page documenting claimant's receipt of the handbook)
- ✓ Relevant employment policies
- ✓ Relevant statutes or regulations addressing the claimant's conduct
- ✓ Relevant industry standards or regulations evidencing why the claimant's conduct amounted to misconduct
- ✓ Relevant disciplinary actions and responses
- ✓ Relevant performance evaluations
- ✓ Documents relating to investigation conducted
- ✓ Documents evidencing termination
- ✓ Witness statements/affidavits



What We Can Learn: Recent Unemployment Cases

- [Powell v. Employment Appeal Bd](#), 2014 WL 7339454 (Iowa Ct. App. 2014)
- [Avenarius v. Employment Appeal Bd](#), 842 N.W.2d 387 (Iowa Ct. App. 2013)
- [Diaz v. Employment Appeal Bd](#), 839 N.W.2d 676 (Iowa Ct. App. 2013)
- [Hiland v. Employment Appeal Bd](#), 837 N.W.2d 681 (Iowa Ct. App. 2013)
- [Goodwin v. Employment Appeal Bd](#), 834 N.W.2d 873 (Iowa Ct. App. 2013)
- [Brown v. Employment Appeal Bd](#), 829 N.W.2d 591 (Iowa Ct. App. 2013)
- [Duchene v. Employment Appeal Bd](#), 829 N.W.2d 590 (Iowa Ct. App. 2013)



Thank you

Sarah K. Franklin
Maggie A. Hanson
Davis Brown Law Firm



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.