



# THE BURDEN OF PROOF

An Unemployment Mock Hearing



# Our Goals for You

- › Learn where a hearing occurs within the unemployment **process**.
- › Understand the **procedures** for attending an unemployment hearing and how the correct people and documents add value.
- › Understand how effective evidence and testimony can **impact** the outcome.
- › Have fun!

# Disclaimer

**We are not providing legal advice. For a legal opinion, please consult your counsel.**

**This workshop is intended for the general benefit of attendees of this  
2018 UWC National UI Issues Conference.**



# Unemployment Hearings – *where do they fit?*

## PROCEDURE

- Initial decision on a claim
- Either side can appeal an unfavorable determination and request a hearing
- Gathering the right information during preparation is critical

## BENEFITS

- Lower unemployment costs and better unemployment payroll tax position
- Increased win rates
- Maintain the integrity of the UI system

# Unemployment Hearing Procedure



Can be scheduled in person or by phone, *based on state procedures*



Both parties may be represented – **6 states require licensed attorney representative**



Burden of Proof determined by the moving party in the separation



Party with the burden of proof presents its evidence and testimony first



Cross-examination allowed



Closing statements allowed in some states

# The Burden of Proof

*(in a typical discharge case)*

Employer must prove a deliberate violation or disregard of reasonable standards



# Introduction

## *Y'all Come Back Now Casino*



- **Dan Tanna – Claimant**
  - Billy Rudnick – Government Relations Manager, Equifax
- **Joe Fogarty – Employer Representative**
  - Joe Fogarty – Government Relations Manager, Equifax
- **Beatrice Travis – 1<sup>st</sup> Employer Witness**
  - Jennifer Howell – Director, UI Claims, Staffmark
- **Bobbie Borso – 2<sup>nd</sup> Employer Witness**
  - Amy Scola – Director, System Operations, Equifax
- **Hugh Daniel – Hearing Officer**
  - Appeals Project Manager, Texas Workforce Commission
- **Lori Roberts – Moderator**
  - Sr. Manager Government Relations, Equifax

# The Case...

- › The employer discharged the claimant, a security guard, after he allowed an underage casino guest into an age-restricted area, where she was served alcoholic beverages. The guest caused a scene and the police were called.
- › The employer policy prohibits its employees from allowing underage guests into age-restricted areas and from serving them alcohol.





# Poll Question #1

› What documentary evidence should the employer present during the hearing? (Choose all that apply)

- Company Policy
- Most recent performance evaluation
- Video of final incident
- Acknowledgement of Company Policy
- Claimant statement on final incident



# THE HEARING

Claimant: Dan Tanna

Employer: Y'all Come Back Now Casino



# Employer Exhibit #1

- Alcohol Awareness and Responsibility Policies and Procedures
- Signed by the claimant on 9/8/2010

***Y'all Come Back Now Casino***

**Alcohol Awareness and Responsibility  
Policies and Procedures**

As a Renowned and Responsible Casino and Entertainment Venue, our employees play an important role in ensuring responsible selling and serving of alcoholic beverages. Security Officers, Bartenders, and Servers are responsible for adhering to local, state, and Federal laws related to the purchase and service of alcoholic beverages. Your best efforts must be expended in prohibiting sales to minors and the entry of underage patrons to areas of the Casino which are designated only for people of legal age. *The policy and procedures outlined below regarding alcoholic beverages must be strictly adhered to by every employee.*

**YOU MUST REFUSE ACCESS TO, OR SERVE OR SELL ALCOHOL TO, INDIVIDUALS WHO CANNOT PRODUCE VALID IDENTIFICATION WHICH SHOWS THEY ARE AT LEAST 21 YEARS OF AGE OR OLDER**

**STANDARD PRACTICES FOR CHECKING IDENTIFICATION**

Only legal proof of identification which includes the date of birth may be accepted. Any ID presented by the customer must be carefully screened and checked to verify age and identity, and that the document is valid and authentic. The law gives you the right to refuse to serve, sell, and/or deliver alcoholic beverages to persons who do not provide you with adequate proof of age. Please refer to your training documents to guide you as to which forms of ID may be accepted.

**PROHIBITING THE SALE, PURCHASE, AND/OR CONSUMPTION OF ALCOHOLIC BEVERAGES BY PATRONS UNDER THE AGE OF 21 PROTECTS THE BUSINESS AND OUR EMPLOYEES FROM POSSIBLE LEGAL ACTION.**

**REMEMBER: WHEN IN DOUBT, CHECK IT OUT!**

Received by:

 DAN TANNA  
Sign, and print name

9/8/2010  
Date

## Poll Question #2

› The claimant was not warned prior to discharge. How, if at all, will this impact the case?

- Very negative impact
- Some negative impact
- Slight negative impact
- No impact



# Employer Exhibit #2

- Progressive Disciplinary Policy
- Included in new hire orientation materials

## *Y'all Come Back Now Casino*

### Progressive Disciplinary Policy

#### **Step 1: Documented Coaching**

Management will clearly describe expectations and steps the employee must take to improve performance or resolve the problem.

#### **Step 2: Verbal Warning**

Management will outline the specific behavior needing improvement and the consequences for continued failure to meet performance or conduct expectations.

#### **Step 3: Written Warning**

Management will outline in writing the specific behavior that needs correction and the consequences of continued failure to meet performance or conduct expectations.

#### **Step 4: Recommendation for Termination of Employment**

The last and most serious step in the progressive discipline procedure is a recommendation to terminate employment.

*Y'all Come Back Now Casino reserves the right to combine and skip steps depending on the severity of each situation and the nature of the offense. Employees may be terminated for a rule violation without prior notice or disciplinary action.*

# Poll Question #3

› Will testimony to the video be admissible without the video?

Yes

No

Unsure



# Poll Question #4

› Did the employer meet its burden of proof?

Yes

No

Unsure



# Poll Question #5

› The claimant testified that the final incident was not deliberate. How, if at all, will this impact his case?

- His case is much stronger
- His case is a little stronger
- No impact
- His case is a little weaker
- His case much weaker





# Poll Question #6

› Based on the testimony and evidence presented, did the hearing referee find in favor of the claimant or the employer?

The employer

The claimant



# Actual outcome...

- › The referee found in favor of the CLAIMANT.
  - The claimant's actions were not intentional.
  - The miscalculation of the guest's age was an innocent, isolated mistake.
  
- › The employer appealed to the Board of Review
  - The Board reversed the referee's decision.
  - They found the claimant's actions were a controllable violation of the employer's policy and that evidence and testimony supported a finding of work-related misconduct.

# Key Takeaways from this Mock Hearing

- › An **unemployment hearing is the last step** in the unemployment evidentiary-gathering process.
- › Examine each element of **what must be proven** to decide what documentation and witnesses will be necessary to support your case.
  - Careful consideration prior to the hearing can make or break your case.
  - The claimant's statement in the file can be invaluable.
- › A discharge without **prior warnings** can still result in a finding of misconduct.

# Questions / Comments

**Thanks to each of you for attending this mock hearing workshop.**

