

# The Legal Strategist

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TEXAS ESOTERIC FACTS

I am frequently asked by employers about the standards used by the Texas Workforce Commission ("TWC") for denying or awarding unemployment benefits to former employees (claimants). Below are some "hints" from the TWC that can offer some guidance on this subject. Remember, these are only "hints" and each case before the TWC are decided on an individual, case by case basis, as each case will contain facts and circumstances that are unique.

- ◆ The oldest tree in Texas is estimated to be 1,500 years old — although some believe it might be even as old as 2,000.

The Feature Topic is a cursory review. If you would like more information on this, or any other topic previously covered in our newsletter, which can be viewed on [The Legal Strategist](#) tab of my web site, please contact my office at 713.526.1883.

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- ◆ Texas has 9.614 billion barrels of crude oil reserves, which is 403.788 billion gallons. This is 31.5% of the U.S.' reserves.

## FEATURE TOPIC: QUIT OR DISCHARGE AND THE TWC CLAIM

The question of whether a claimant quit or was fired is very important. It determines who has the burden of proof in the TWC case. The burden of proof in an unemployment claim falls on the party that initiated the work separation. If a claimant quit, he has the burden of proving that he had good cause connected with the work to resign when he did. If the claimant was fired, the employer has the burden of proving 1) that the discharge resulted from a specific act of misconduct connected with the work that happened close in time to the discharge and 2) that the claimant either knew or should have known she could be fired for such a reason. Sometimes the circumstances are murky, and it is unclear exactly what happened. Here are some hints as to how TWC will rule:

- ◆ Whoever first brought up the subject of a work separation might be held to be the one who initiated the separation. "Mutual agreement" work separations are usually held to be discharges;
- ◆ A resignation under pressure is a form of discharge. If the employee had no effective choice but to leave when they did, it was an involuntary work separation, and the employer's chances in the case will depend upon its ability to prove misconduct;
- ◆ If an employee expresses a vague desire to look for other work, and the employer tells the employee to go ahead and consider that day to be his final workday, that will usually not be considered a resignation, since no definite date has been given for the final day of work;
- ◆ If the encounter starts out as a counseling session or a reprimand, and the employee gets discouraged and offers to quit, watch out. If you immediately "accept the resignation", it might be considered a discharge. It would be better to remind the employee that all you wanted to do was talk about a problem, not let him go, and ask the employee whether resignation is really what he wants. If he then confirms that he wants to resign, ask him how much notice he is giving. If he gives two weeks' notice or less, and you accept the notice early within the two weeks, it will still be a quit, not a discharge. (An employer does not have to pay an employee for the portion of a notice period that is not worked, unless company policy promises such a payment.);
- ◆ If you have an employee sign a prepared, fill-in-the-blank resignation form, that will look suspicious. The employee might claim that he was forced to sign it or else was tricked into signing it, which will only hurt your case. Have the employee fill out a resignation letter in his own words, preferably in his own handwriting, if you can persuade the employee to cooperate to that extent;
- ◆ If an employee offers to resign, but you instead convince the employee to stay, and later change your mind and "accept the resignation", you have just discharged the employee! Persuading an employee to stay after they have tendered their resignation amounts to a rejection of the resignation, which means that the offer to resign expires, and the employee's acceptance of your pleas to stay amounts to a rescission of the resignation;
- ◆ If an employee asks to be laid off, be careful - that can be a trap. Do not react like some employers have and fire the employee. Remember, if the employee resigns, they have the burden of proving good work-related cause to quit. It would probably be best to answer any layoff requests with a response to the effect that the request is denied and a reminder that the employee is still needed, thus placing the ball back in the employee's court. If the employee persists, follow that up with a statement to the effect that if the employee no longer wishes to work there, they need to submit a resignation request in writing, and remind them that in the meantime, they still have a job to do. Do not prepare a resignation letter for the employee to sign -- have the employee prepare their own statement of resignation, and then respond to that statement in writing, attaching a copy of the employee's resignation notice to the response. Be sure that any exit paperwork reflects that the employee resigned;
- ◆ If you are merely counseling an employee about a matter of concern, and the employee starts badgering you with questions and comments like "Are you telling me I'm fired?", "So you're firing me for this?", or "I can't believe you're firing me for this!", watch out. Things like that are often seen in situations where the employee is trying to maneuver the employer into a premature discharge in the hopes that an unemployment claim might turn out favorably for the claimant.