

How to File a Petition for Review for Unemployment

Second Appeal Process

What if I disagree with the ALJ's decision?

If a decision goes against you, you have the right to appeal by filing a Petition for Review with the Commissioner of the Employment Security Department. A Commissioner's Review Judge will review only the ALJ's decision, the hearing tape, and the exhibits. There will not be another hearing. You have 30 days to file a Petition for Review after the date OAH mails the decision to you. The instructions for filing a Petition for Review are set forth in the ALJ's decision under the section entitled "Petition for Review Rights."

The Petition for Review must be in writing. It must be postmarked and mailed to the Agency Records Center, PO Box 9046, Olympia, WA 98507-9046, and must include your docket number. Do not file your Petition for Review by facsimile (FAX). Do not mail your petition to any location other than the Agency Records Center or your appeal may be dismissed. A Petition for Review need not be filed on an official form.

All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review, and may not exceed five pages.

If you missed your hearing or are filing your Petition for Review after the 30-day filing period, explain why. Keep in mind that failing to file on time could mean your case will not be reviewed. If you file a Petition for Review, the other party will receive a copy of the petition and may reply.

What does the Commissioner's Review Office do?

The Commissioner's Review Office does not hold new hearings. It reviews only the evidence presented at hearings conducted by the ALJ. The evidence consists of tape recorded testimony given at the hearing and any written or physical evidence presented at the hearing.

The Commissioner's Review Office will also consider any written arguments you may want to present. Written argument is not required, but if you choose to submit argument, you must send it in with your Petition for Review. Your argument may not exceed five pages. The Commissioner's Review Office strictly enforces this requirement, and will return any pages over five.

After reviewing the case, the Commissioner's Review Office will issue a decision to affirm, set aside, or modify the ALJ's Initial Order. It may also send your case back to OAH ("remand") if there is insufficient evidence to make a decision.

Commissioner Review Office Phone Number: 360-438-4670

April 12, 2007

Agency Records Center
Employment Security Department
PO Box 9046
Olympia, WA 98507-9046

RE: Mary O. Moore
SSA: 111-11-1111
Docket Number: 02-2007-00000

Dear Commissioner:

This letter is a Petition for Review of the Initial Order by Administrative Law Judge (ALJ) Jon M. Loreen entered on March 14, 2007. The ALJ denied benefits because he concluded that Ms. Moore did not establish good cause to quit her job under RCW 50.20.050. The ALJ erred because when the employer refused to allow Ms. Moore to rescind her resignation based upon three stale disciplinary matters, the employer effectively discharged her without proof of misconduct. Because the case should have been adjudicated as a discharge without misconduct, Ms. Moore requests that the decision be set aside and that the ESD grant her benefits.

BACKGROUND

1. Job Separation

Ms. Moore began full-time work as a senior retail sales person for Qwest Communications on October 4, 2005.

Because Ms. Moore experienced undue stress on the job, she requested and the employer granted her a three month leave of absence from work. The leave ended on December 1, 2006.

However, when she returned to the same stressful job situation at work, she decided to resign. She submitted her letter of resignation on December 8, 2006, to be effective December 29, 2006. Ms. Moore thought about returning to school or securing another job. However, she did not enroll in school and later decided to try to find other employment at Qwest. She looked for other positions at Qwest, but did not find one. On December 27, 2006, Ms. Moore spoke with her union representative about her position at Qwest. She learned that she did not need to resign and that the union would assist her in finding other employment at Qwest due to the working conditions at her location.

The next day, December 28, 2006, Ms. Moore informed her manager that she wanted to rescind her resignation letter. He told her he needed to speak with the retail

area manager. Subsequently, the employer told Ms. Moore that there would be a meeting on December 29, 2006, which she was required to attend.

Ms. Moore attended the meeting along with the retail manager, her immediate manager, and her union representative. Rather than discussing her request that her resignation be rescinded, the employer instead presented her with three disciplinary notices, none of which had been given to her prior to the meeting.

The disciplinary actions included the following:

- a transaction in which Ms. Moore failed to check for proper authorization before making changes on an account;
- failure to meet monthly quotas for two months;
- improper processing of a bill payment.

At the end of the meeting on December 29, 2006, regarding these three disciplinary notices, all of which had occurred sometime prior to August 31, 2006, the employer told Ms. Moore that it would not allow her to rescind her resignation. In fact, as the employer's written record of that meeting indicates, based on the three disciplinary notices "in her file she would be status as [sic] "NON REHIREABLE." Exhibit 14, Pg. 2.

2. Administrative Decisions

As a consequence of being separated from her job, Ms. Moore applied for unemployment benefits, but the ESD denied her those benefits and ALJ Loreen affirmed the denial. In his order, the ALJ made several findings of fact including that the employer had replaced Ms. Moore prior to December 28, 2006 (Finding of Fact No. 5). The ALJ also found that the employer met with Ms. Moore regarding her request to rescind her resignation on December 29, but only presented her with three disciplinary notices at that meeting, all of which had occurred prior to August 31, 2006, and had never been discussed with her prior to the meeting on December 29. (Findings of Fact 7, 9, 10). Most importantly, the ALJ entered this finding of fact:

11. The three violations did not, individually or collectively, rise to the level that would have caused the employer to discharge the claimant.

Finding of Fact 11.

ISSUE ON APPEAL

Under the Employment Security Act was Ms. Moore eligible for benefits when she was effectively discharged after she notified the employer that she wanted to rescind

her resignation but the employer, based solely upon three disciplinary matters from at least six months before, refused to grant her request to rescind?

ARGUMENT

MS. MOORE WAS FIRED WITHOUT PROOF OF MISCONDUCT AND WAS ENTITLED TO BENEFITS BECAUSE THE EMPLOYER'S REFUSAL TO GRANT HER REQUEST TO RESCIND HER RESIGNATION WAS NOT PREMISED ON ITS HAVING REPLACED HER BUT UPON THREE STALE DISCIPLINARY MATTERS NEVER BEFORE DISCUSSED WITH HER PRIOR TO HER REQUEST TO RESCIND HER RESIGNATION.

In concluding that the issue in this case turned solely on the employer's act of replacing Ms. Moore, the ALJ misinterpreted and misapplied two prior commissioner's decisions regarding rescinded resignations and the order should therefore be reversed. The employer refused Ms. Moore's request to rescind her resignation not because it had replaced her but because of three stale disciplinary matters never before discussed with Ms. Moore until she requested to rescind her resignation.

While the ALJ found that the employer had hired a replacement for Ms. Moore, there was no finding that the employer's replacing Ms. Moore was the reason the employer denied Ms. Moore's request to rescind her resignation.

From the ALJ's findings of fact it does not appear that the employer's replacing her had anything to do with its refusal to grant Ms. Moore's request to rescind: the meeting concerning her request to rescind focused on three stale disciplinary matters none of which had ever been presented to Ms. Moore. These three disciplinary matters were the obvious reason for Ms. Moore's job separation, a separation that she expressly did not want to occur but one that the employer enforced based apparently on those three alleged disciplinary matters.

Further, the ALJ's findings regarding the meeting on December 29 do not indicate that the employer even discussed with Ms. Moore or her union representative that her position had been filled. In fact, the reason for the employer's refusal of Ms. Moore's request is shown in the employer's own documentation of the December 29 meeting at which the three disciplinary matters were discussed. The employer's written record of that meeting indicates that when Ms. Moore asked if there was a chance she could be rehired the employer's response was that, based on the three disciplinary notices "in her file she would be status as [sic] 'NON REHIREABLE.'" Exhibit 14, Pg. 2.

Had the employer wanted to refuse Ms. Moore's request to rescind her resignation *based upon its having hired a replacement prior to December 28*, there would have been no reason for the employer to meet with her on December

29 and the ALJ's reliance on the following two prior decisions might have been more appropriate: *In re Alef*, Empl. Sec. Comm'r Dec. 2d 699 (1982); *In re Davis*, Empl. Sec. Comm'r Dec. 487 (1961).

But the employer's act of replacing Ms. Moore had nothing to do with its refusal to grant her request to rescind. That the employer met with Ms. Moore regarding her request to rescind her resignation *and then subsequently premised its denial upon three stale disciplinary matters distinguishes* Ms. Moore's case from either *Davis* or *Alef*

In the *Davis* decision, the employer specifically told the resigning employee, without any further consideration of her request, that it was denying her request to rescind her resignation *because* it had already replaced her. Therefore, the Commissioner said, because "[i]t cannot be said that the ultimate unemployment of the appellant was due to actions taken by her employer," the case would be treated as a voluntary quit. To the contrary in Ms. Moore's case, the employer agreed to meet with Ms. Moore regarding her request and denied the request not because it had replaced her but because of the three disciplinary matters that had arisen nearly six months before. Ms. Moore's case therefore is more similar to *Alef*, carefully read, than to *Davis*.

But the *Alef* case is a bit more complicated than the ALJ's rendition of it in the ALJ's conclusion of law 2(b). It was not simply that the employer had not replaced the claimant in that case that caused the ESD to treat the job separation as a discharge. What happened in that case was that on June 24 the claimant left a letter in his immediate supervisor's "inbox" stating he was resigning and would be back the next day. The next day, June 25, after his immediate supervisor asked him to sign official termination papers and return the employer's property, both of which he did, he began to waiver in his resolve to resign. He and his immediate supervisor talked about a possible leave and his immediate supervisor said he would talk to his own supervisor (the "agent in charge") to see what could be done. The Commissioner's Decision notes that because of this arrangement, when the employee left his immediate supervisor's office at that point, the employer "fully understood that petitioner's intent to immediately resign had been rescinded"

However, the agent in charge of both the employee and the immediate supervisor stated that the immediate supervisor had no authority to grant a leave and that as far as the agent in charge was concerned, he had already accepted the resignation and would not allow the employee to rescind it. The Commissioner decided therefore that because the employer refused to grant the request to rescind, the case would be treated as a discharge because the employee "*left work involuntarily*":

When on the afternoon of June 25, the agency "accepted" petitioner's resignation, *it was in fact insisting that petitioner go through with his*

original plan of immediate resignation even though it knew that petitioner had rescinded that plan and had been given approval for one hundred hours of leave. Under the facts presented, we conclude that petitioner left work involuntarily.

Alef, Empl. Sec. Comm'r Dec. 2d 699, Third Paragraph from End of Decision (emphasis added). Notice that whether or not the employer had replaced the employee *had nothing to do with the rationale for treating the case as a discharge rather than a quit.*

In Ms. Moore's, just as in *Alef*, the employer "fully understood that petitioner's intent to immediately resign had been rescinded . . ." On December 28, 2006, Ms. Moore informed her manager that she wanted to rescind her resignation letter. He told her he needed to speak with the retail area manager. Subsequently the employer told Ms. Moore that there would be a meeting on December 29, 2006, which she was required to attend. Thus, just as in *Alef*, the employer – through Ms. Moore's immediate supervisor – just as the immediate supervisor in *Alef* – fully understood that her "intent to immediately resign had been rescinded."

As a consequence of this request, the employer set up a meeting with her on December 29. Whether she had been or had not been "replaced" had nothing to do with the employer's decision to meet with her about her request to rescind her resignation and the employer's denial of that request had nothing to do with whether she had been replaced or not. Furthermore, using the disciplinary matters as grounds for its insistence that Ms. Moore, like the claimant in *Alef*, "go through with" the "original plan of immediate resignation even though it knew that petitioner had rescinded that plan" meant that the employer was the moving party in the job separation, that Ms. Moore "left work involuntarily," and that the case, just as in *Alef*, should have been treated as a discharge.

The ALJ's Order in Ms. Moore's case therefore is in error because it misinterprets and misapplies prior Commissioner's Decisions and Ms. Moore's case should have been adjudicated as a discharge. Because it should have been adjudicated as a discharge, and because the ALJ himself finds that the stale disciplinary matters "did not, individually or collectively, rise to the level that would have caused the employer to discharge the claimant," there was no proof of misconduct sufficient to deny Ms. Moore benefits.

CONCLUSION

Therefore, Ms. Moore respectfully requests that the Commissioner reverse the ALJ's Order and grant her unemployment benefits.

Respectfully submitted,

**Marc Lampson
Attorney at Law**

I certify that on this ___ day of April 2007 a copy of this document was mailed via first class U.S. Mail, with proper postage attached, to:

**Agency Records Center
Employment Security Department
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Olympia, WA 98507-9046**

**Transitional Programs
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**Kevin Bender
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