Evidence in UI Hearings

Scenarios Discussion

Slides 38 through 49 of the presentation include a number of evidence scenarios that commonly occur in UI cases. These materials include a discussion of the issues arising from the scenarios and a potential resolution of the questions following the guidance of the Federal Rules of Evidence. Keep in mind that various states may have different evidence codes or rules, or different interpretations or applications of the language of their code or rules even when they mirror the federal rules. The discussion in these examples should be compared to your state's evidentiary standards and be modified accordingly.

In many of these scenarios, the issue is whether the evidence would be admissible under one of the hearsay exceptions. The significance of that discussion depends upon how your jurisdiction handles receipt of hearsay evidence. In many jurisdictions, hearsay otherwise "admissible" under the rules of evidence is competent to prove a material fact, whereas "inadmissible" hearsay is either not received into evidence, or limited in purpose. In other jurisdictions, hearsay of any kind may be received into evidence for any purpose. Even in the latter situations, however, whether hearsay falls within an exception may be a useful factor in weighing its probative value.

The scenarios assume that all documentary evidence being considered can be properly authenticated, that all witness statements can be shown to have been made on personal knowledge, and that any other foundational requirements can be met.

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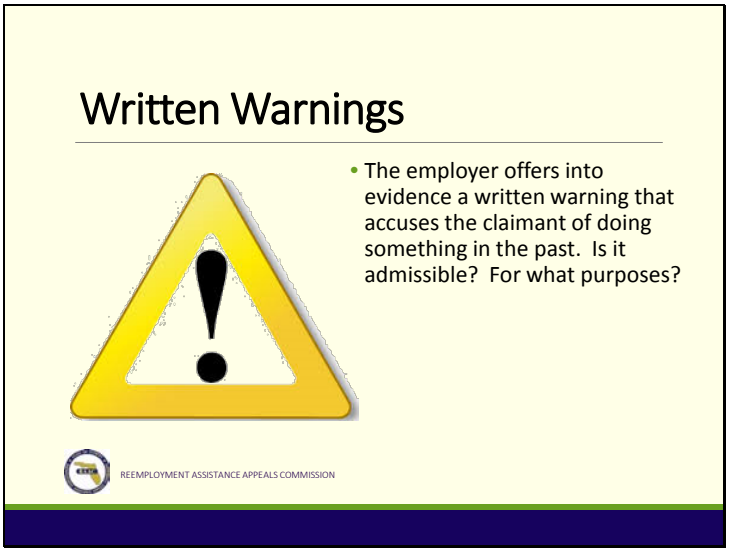

If the employer is offering the document merely to show a prior warning was issued to a claimant, the document may not be hearsay at all and may be admissible once properly authenticated. This is because hearsay must contain an assertion of fact. If the document is being offered merely to show that a prior warning was issued, and there is competent evidence of its delivery or the claimant admits receiving it, the document is more in the nature of tangible evidence.

The more complex issue is whether the warning may be used as substantive proof of the underlying actions for which the warning was issued. If offered for that purpose, the document is being offered for the truth of matters asserted in it, and must meet the requirements of a hearsay exception such as the business record exception. For the warning to provide probative evidence of the underlying actions alleged in it, (1) the employer must demonstrate that information in the document was provided by a person or persons with direct knowledge of the alleged events (as required by the business record exception); and (2) the warning must contain sufficient narrative detail regarding the events to support a finding. In short, the warning must be similar to a written witness statement.

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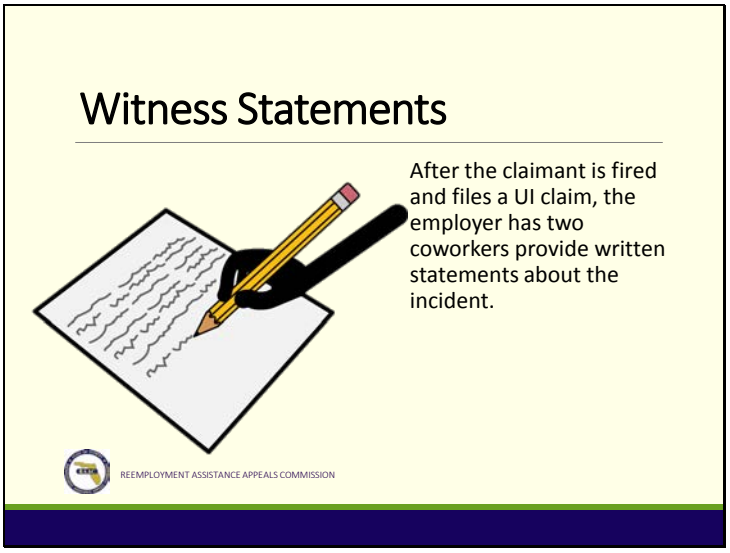

In this scenario, timing is everything. A written statement of a witness that is prepared in the ordinary course of business may be admissible as a business record. While there is a minority view that internal investigations into actions of misconduct are only tangential to ordinary business operations and therefore may not meet the test of the business record exception, the large majority of courts have held that such statements are business records if it is demonstrated that they were prepared in the ordinary course of an employer's disciplinary or investigatory practices.

In this scenario, the statements were not prepared contemporaneously with or immediately after the events recorded; instead, the employer obtained them only *after* the claimant was separated and filed a claim for benefits. In this situation, the witness statements would more likely be deemed prepared in anticipation of litigation, and thus would not meet the business record exception. The employer would have to establish some other basis to admit the documents.

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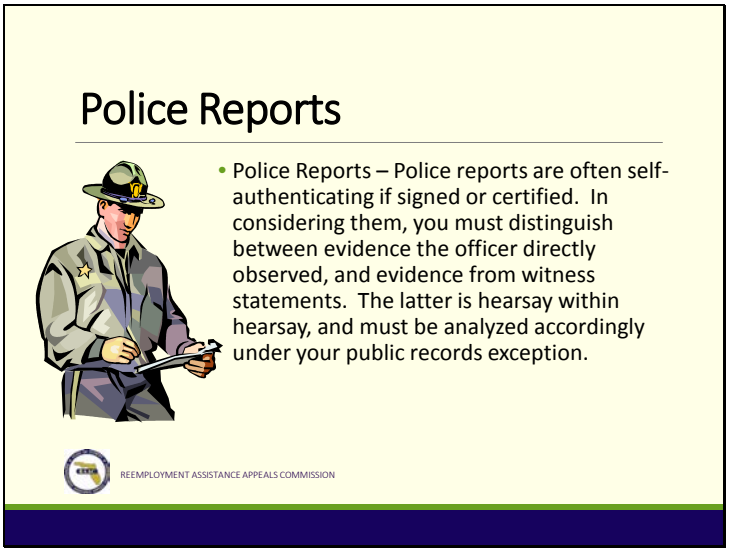

Police reports will rarely be authenticated by the officer who completed them. Thus, the first issue is whether the report is self-authenticating under your law, or whether a witness who received or obtained a copy can authenticate it.

Assuming they are properly authenticated, police reports are admissible under the public records exception. In that situation, all of the observations and statements by the officer completing the report are admissible for the truth of the matter asserted.

The more difficult question is whether witness statements verbally taken by the officer and written by him or her in the report are admissible. These statements would be considered hearsay within hearsay, and depending upon your state's law, may or may not be directly admissible under the public records exception. Note that if the officer has a witness prepare his or her own statement, or sign a statement, the hearsay within hearsay issue is resolved, but the issue remains as to whether a witness statement not prepared by an employee or government official, but contained in a public record, is admissible. In either case, under FRE 803(8)(c), a tribunal can accept a third-party statement at least indirectly if the public employee relies on the statement as a basis for a factual finding made by the employee, and the witness statement thus becomes the predicate to support the finding. In short, if a police officer credits a witness's testimony and make a determination in the report based on it, the evidence in the statement is now admissible to support the officer's report. Note that some states have not adopted this provision of the federal rules.

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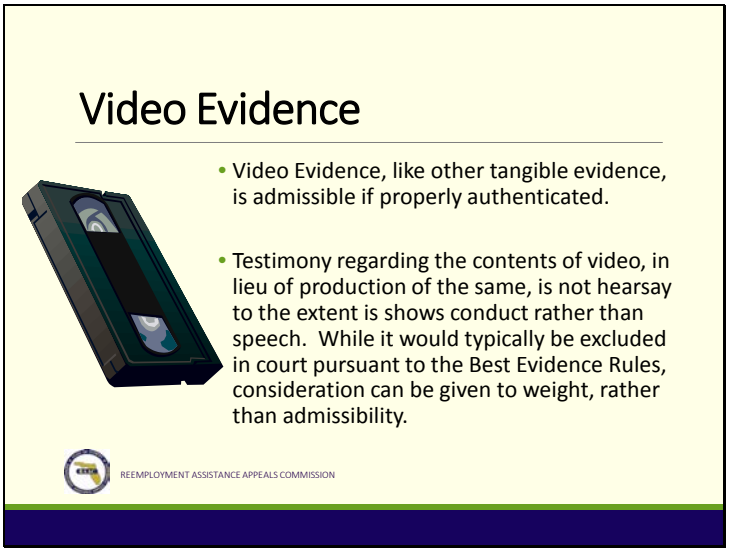

A common scenario in UI cases involves an employer witness watching a company surveillance video, and then testifying as to its contents without offering the video into evidence as a tangible record. While hearing officers often call such testimony hearsay, it is not – the witness is describing the behavior of persons captured in the video, rather than their statements. In this scenario, the actual evidentiary issue is the best evidence rule. The best evidence rules are a classic example of the kind of rule that UI tribunals do not always apply strictly. Thus, your jurisdiction's application of the best evidence rules will determine whether the testimony is admissible.

If the video contains audio as well, then the hearing officer must examine the witness' testimony under the hearsay rules. In that regard, a recording of a conversation between two people is, for *hearsay* purposes, no different than a live conversation. Testimony about the contents of audio captured on a video is admissible under the hearsay rules under the same circumstances as testimony about a conversation heard live would be.

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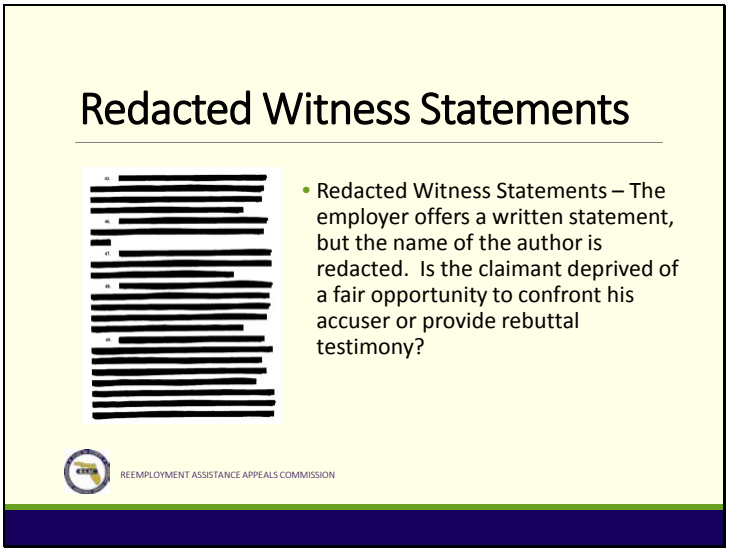

It is not uncommon for employers to offer witness statements or other business records in which the name of an individual involved, or even the name of author of the statement, is redacted. In those situations, the hearing officer must determine whether the redaction impairs the claimant's ability to properly confront the testimony against him. At a minimum, the hearing officer should inquire as to whether the claimant is aware of the identity of the person who prepared the statement, or the identity of any individual whose name is redacted. This ensures that the claimant can provide responsive testimony not only as to the incidents discussed in the statement, but also testimony which may rebut the accuracy of the statement or impugn the credibility of the individuals providing information or drafting the statement. If the redaction impairs the claimant's ability to defend himself or herself, the hearing officer should evaluate whether admission of the document is procedurally prejudicial to the claimant, requiring exclusion of the document.

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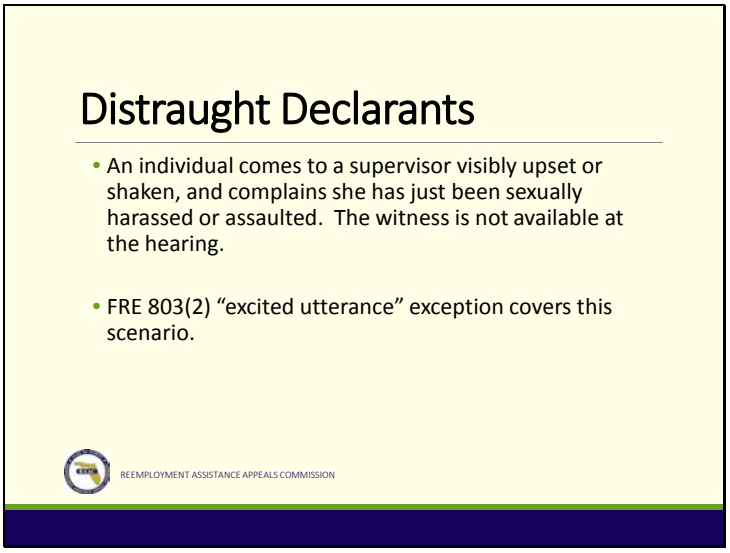

As indicated in the slide, the scenario involves the statement of a declarant who does not testify at the hearing, but who made the statement to a witness who testifies as to its content, and the declarant's statement was given under such circumstances as to possibly constitute an "excited utterance." An "excited utterance" is a statement made under the direct and continuing emotional excitement or agitation of an event that caused it. "Excitement" within the meaning of the rule does not simply mean a state of anticipation, but includes a situation where the declarant is suffering from the effects of a traumatic incident. Under the hearsay rule, the key inquiry for the hearing officer is to determine whether the statement was made sufficiently close to the traumatic incident so that the declarant did not have time to fabricate a story. In this scenario, the employee's statement to her supervisor would be admissible.

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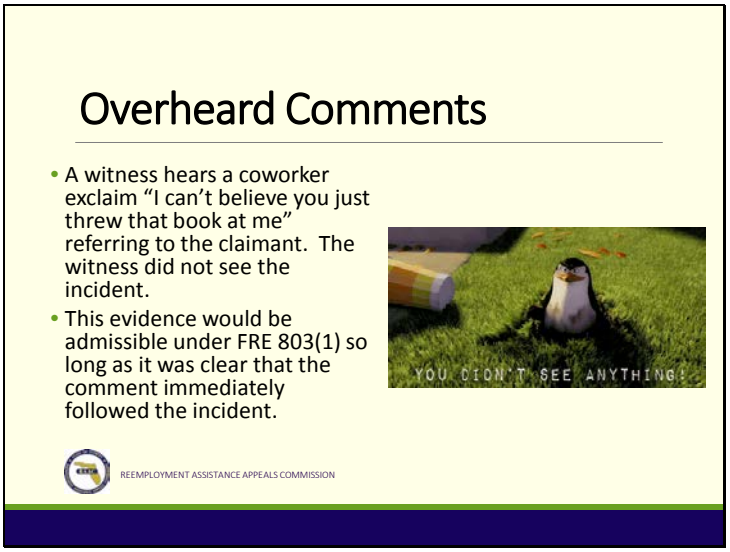

Similar to the excited utterance exception, this situation involves the "spontaneous statement" exception where an individual makes a statement immediately after perceiving it and without time to fabricate. The referee should make sure it appears the declarant spoke immediately after observing or experiencing an event and the statement was a reaction to the event.

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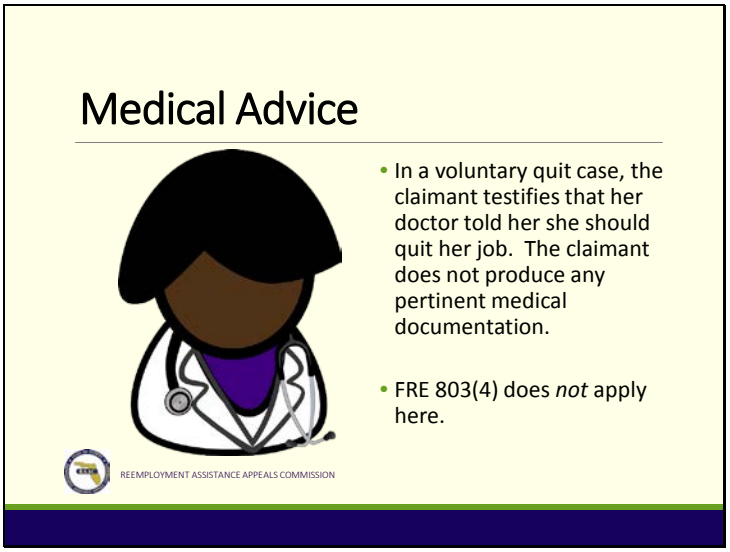

The FRE 803(4) exception applies to statements made by patients to a physician for purposes of treatment. Under that rule, statements by the patient, such as might be recorded in a patient's chart or testified to by the physician, are admissible as an exception to hearsay.

This scenario, however, involves the opposite situation – a statement made by a doctor to a patient. The hearsay exception above does not apply. This statement, if offered to prove that the claimant was no longer able to work due to health or disability reasons, is inadmissible hearsay. Historically, many tribunals accepted the evidence anyway. However, most recent decisions have found such testimony insufficient when unsupported by medical evidence.

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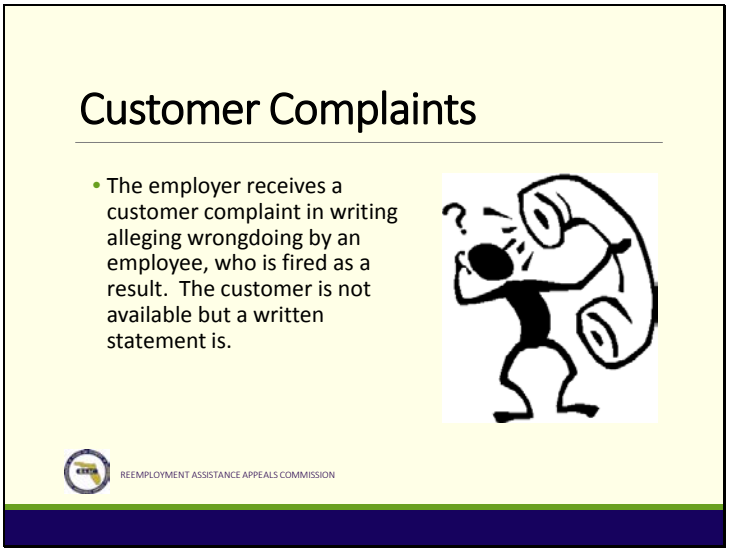

The issue in this scenario is whether the written customer complaint can be admitted under a hearsay exception for business records. The employer must first establish that it receives and maintains such written complaints in the ordinary course of business. The more complex issue is whether the information from a customer constitutes "a record made at or near the time by — or from information transmitted by — someone with knowledge." Under the Federal Rules, the prevailing view appears to be the common law rule that all information in the record must have been originally provided by a person acting in the course of the business enterprise's activities – thus, a written statement from a person unaffiliated with the business, such as a customer, does not meet the standard. You should examine your state's business record exception on this issue to determine whether non-employee statements are admissible under this exception.

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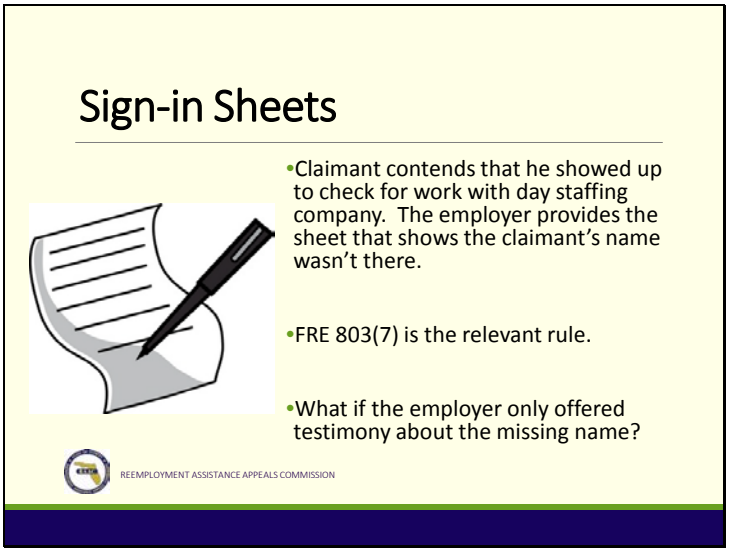

In this scenario, the employer's witnesses have no personal knowledge as to whether the claimant appeared on a particular day, while the claimant contends he did. The question is whether the documents are admissible under the hearsay rules. FRE 803(7) permits a party to offer its records to show by the absence of a particular entry that an event did *not* occur. The employer would use the records showing the absence of the claimant's name to prove by inference that he did not appear and sign in, which is the best evidence they would probably have in the situation. Interestingly, while this principle is codified in a hearsay rule, many authorities state that such evidence isn't hearsay at all.

What if the employer does not offer an actual document, but merely provides oral testimony that they examined their records and their records did not show his name? This could raise best evidence rule implications, but again, in UI proceedings, tribunals often permit such testimony and consider the lack of a document as going to weight of the evidence rather than admissibility.

In either situation, the hearing officer should inquire into the employer's processes as to how such records are created, stored and reviewed, in order to get a better idea of the reliability of the document and any testimony regarding it. The hearing officer must determine that it is the employer's regular practice to create such records for a proper inference to be drawn that it did so on this occasion.

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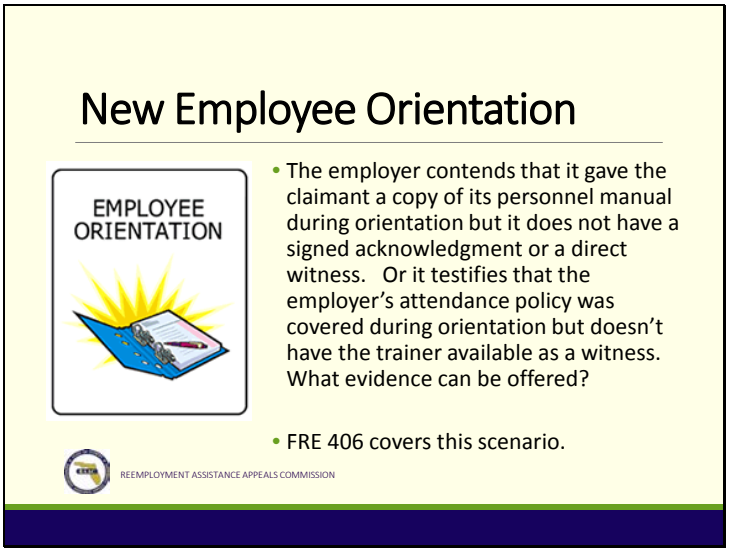

An issue often arises as to what an employee was told at orientation, or how an employee would have been trained. Employers will rarely have a witness who can remember the specific details of a specific occurrence of a task that he or she performs regularly. Instead, the witness will often testify as to what "would have happened." This is not speculation nor is it hearsay. Instead, the employer is offering evidence of its normal practice in such situations. Under the rules, routine practice is admissible and probative to establish what happened in a particular instance. The same rule applies to behavior of an individual, so a claimant could offer testimony of his regular workday habits to create an inference that he conformed to that habit on a particular day.

Routine practice testimony fills in a gap where there is not likely to be a specific memory or record of what happened with regard to an event that recurs. To determine how probative the evidence is, the hearing officer should conduct a sufficient inquiry to see whether there are established procedures or checklists involved in performing the activity, the degree to which the activity is routinized, how experienced the person performing it was, etc., to determine how likely it was that the party conformed to expected behavior on the day in question.

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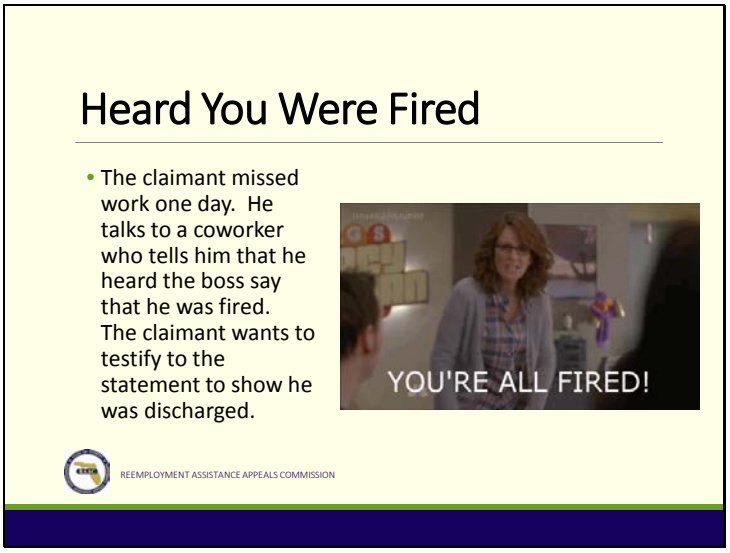

The issue in this scenario is hearsay. A statement by a coworker that is offered for the truth of the matter asserted is hearsay, and it must be determined whether it can be offered against the employer.

Under FRE 801(d)(2), statements of a party opponent are excluded from the definition of hearsay. Under other authorities, they are often considered "admissions" and fall within an exception. Under either approach, admissibility depends on whether the statement can be attributed to the employer. The most important tests under the rules in this situation are whether the statement "was made by a person whom the party authorized to make a statement on the subject" [FRE 801(d)(2)(C)] or "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed" [FRE 801(d)(2)(D)]. In either case, the issue is whether, due to the employer's actions, the coworker had actual or apparent authority to speak for the employer in this instance. If the coworker had been instructed to pass along this information, the employer would have given such authorization. If the employer had relayed information in the past through this coworker, again, the statement could be deemed to be made pursuant to implicit authority. Absent some action of the employer authorizing the statement to be made to the claimant, however, it would not fall within this exclusion or exception.