

1996

# Mary L. Sassin v. Board of Review of the Industrial Commission of Utah, Department of Employment Security and Walmart Stores, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MARY L. SASSIN

Petitioner,

vs.

BOARD OF REVIEW OF THE  
INDUSTRIAL COMMISSION OF UTAH,  
DEPARTMENT OF EMPLOYMENT  
SECURITY AND WALMART STORES  
INC.

Respondents.

Case No. 960083-CA

Priority No. 7

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REPLY BRIEF OF PETITIONER

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Petition for Review from the Board of Review  
of the Industrial Commission of Utah,  
Department of Employment Security,

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 960083-CA

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REPLY BRIEF OF PETITIONER

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ARGUMENT

I. PETITIONER MARSHALED THE EVIDENCE.

Respondent's argument Petitioner has failed to marshal the evidence is without merit. Petitioner marshaled the following facts:

The employer representative testified that Petitioner was fired for having a drink of water in the phone area contrary to store policy. (Brief of Petitioner at page 6 ¶ 9).

The employer representative testified that Petitioner could get water by walking a distance of about 100 feet into a back room. (Brief of Petitioner at page 6 ¶ 10).

The ALJ stated "the Administrative Law Judge finds the employer offered the claimant a reasonable alternative by permitting her to

keep the beverage relatively close at hand but out of the customer sales area." (Brief of Petitioner at page 6 ¶ 12).

The employer representative testified that the employee manual states that it is unacceptable to have food or drink on the floor area. (Brief of Petitioner at page 7 ¶ 14).

Based on these facts, the ALJ found that Petitioner had the requisite knowledge of the drink policy. (Brief of Petitioner at page 7 ¶ 21).

In support of its argument, Respondent cites two allegedly non-marshaled facts from a 111 page record. Respondent argues Petitioner failed to marshal evidence Jim Curtis testified from personal knowledge. Respondent argues Petitioner failed to point out she had knowledge regarding the company drink policy.

A. JIM CURTIS NEVER TESTIFIED FROM PERSONAL KNOWLEDGE.

In support of the argument Jim Curtis presented more than hearsay evidence, Respondent states:

For example "Petitioner's Brief, pages 20-21 would lead the Court to believe that the Administrative Law Judge's findings and conclusions that the claimant knew the employer's policy, were all based on hearsay. This is not correct. at R. 18 the Administrative Law Judge asked Mr. Curtis, "Did you ever personally talk to her about [the policy]?" Mr. Curtis replied, "Yes, I did." The Administrative Law Judge then asked, "And when was that?" Mr. Curtis replied, "It was about a month prior to her having it out there, before we terminated her." (Brief of Respondent at pages 18-19).

When taken in context, it is clear Jim Curtis had no personal knowledge regarding the relevant evidence. Immediately after

stating he had personal knowledge, Mr. Curtis began to testify based on hearsay not his alleged personal knowledge. The very next statement made by Mr. Curtis is as follows:

The final incident were associates came to me, three different associates, came to me and told me that it was still continuing, that she wasn't changing, that she had made the statement, **of course it's hearsay** because I didn't hear her say it, but what they told me she said is that "I don't care what management says, I'm going to have it out here." And that's when. . . (Emphasis added). (R at 18).

B. THE FACT PETITIONER HAD KNOWLEDGE OF THE DRINK POLICY IS NOT RELEVANT.

Respondent further argues Petitioner failed to marshal any evidence Petitioner had knowledge of the drink policy. Whether Petitioner had knowledge of the drink policy is irrelevant for the purposes of this appeal. That is not an issue before this Court.

In her brief, Petitioner does not contend she lacked knowledge of the drink policy. Petitioner contends she appealed the issue to the Board of Review, the Board ignored the issue and the failure to address the issue was arbitrary and capricious. This is clearly set forth in Petitioner's brief:

THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THE EMPLOYER NEVER SHOWED THE ELEMENT OF KNOWLEDGE WAS ARBITRARY AND CAPRICIOUS. (Brief of Petitioner at page ii, Table of Contents).

Was the Board's failure to consider Petitioner's contention, that the employer never showed the element of knowledge, arbitrary or capricious? (Brief of Petitioner at page 2, Preservation of the Issue).

The failure of the Board to consider the issues of knowledge, control, serious effect on the employer, or whether the employer met its burden at hearing was arbitrary and capricious and should be reversed. (Brief of Petitioner at page 10, Summary of Argument).

THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THE EMPLOYER NEVER SHOWED THE ELEMENT OF KNOWLEDGE WAS ARBITRARY AND CAPRICIOUS. (Brief of Petitioner at page 13, Heading).

In it's decision, the Board never addressed the issue of whether the element of knowledge was shown by the employer. (Brief of Petitioner at page 15).

Petitioner's "Memorandum in Support of Appeal" clearly set forth the relevant facts and authority regarding the issue of knowledge. (R. 57-59). Since the Board's decision makes no reference to this element, its decision should be reversed as being arbitrary and capricious. (Brief of Petitioner at page 15).

The Board's failure to address the issues of knowledge, control, serious effect on employer, and whether the employer met its burden at hearing was arbitrary and capricious, did not lighten Petitioner's burden and should also be reversed. (Brief of Petitioner at page 22, Conclusion).

Since the issue of whether Petitioner had knowledge is not before the Court, Petitioner has no burden of marshaling such evidence.

**II. IT IS IRRELEVANT WHETHER IT WAS JIM CURTIS OR THE FRICK COMPANY THAT FAILED TO PROVIDE EVIDENCE TO MEET THE EMPLOYER'S BURDEN SHOWING JUST CAUSE TO DISCHARGE.**

Whether Jim Curtis or the Frick Company is responsible for not providing evidence to the court is irrelevant. The Frick Company

failed to provide the necessary documentation prior to hearing and Jim Curtis failed to provide any credible evidence at hearing.

Petitioner clearly argued this point in her brief. (Brief of Petitioner at pages 18 and 19). Therefore, whether Jim Curtis or the Frick Company failed to meet the burden in showing just cause for discharge is irrelevant.

**III. RESPONDENT NEVER ADDRESSED THE MAJORITY OF ISSUES RAISED BY PETITIONER ON APPEAL.**

In her appeal, Petitioner raised the following issues:

IT IS NOT A REASONABLE EMPLOYMENT PRACTICE TO REQUIRE A SWITCHBOARD OPERATOR TO WALK 100 FEET TO GET A DRINK OF WATER (Brief of Petitioner at page 10).

THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THE EMPLOYER NEVER SHOWED THE ELEMENT OF KNOWLEDGE WAS ARBITRARY AND CAPRICIOUS. (Brief of Petitioner at page 13).

THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THE EMPLOYER NEVER SHOWED THE ELEMENT OF CONTROL WAS ARBITRARY AND CAPRICIOUS. (Brief of Petitioner at page 15).

THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THAT THE EMPLOYER NEVER SHOWED THE ACTIONS OF PETITIONER HAD A SERIOUS EFFECT ON THE EMPLOYEE'S JOB OR THE EMPLOYER'S INTERESTS WAS ARBITRARY AND CAPRICIOUS. (Brief of Petitioner at page 17).

THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THAT THE EMPLOYER NEVER MET ITS BURDEN TO SUPPORT A SHOWING OF JUST CAUSE FOR DISCHARGE WAS ARBITRARY AND CAPRICIOUS. Brief of Petitioner at page 18).

Of these five issues, Respondent addressed one. Respondent failed to address whether the failure by the Board of Review to




deal with the issues of knowledge, control, serious effect on employer, and whether the employer met its burden at hearing was arbitrary and capricious.

**CONCLUSION**

Petitioner respectfully requests that the decision of the Board of Review be reversed.

DATED this 8th day of June, 1996.



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Aaron J. Prisbrey  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 8th day of June, 1996, I did personally mail two copies of the above and foregoing REPLY BRIEF OF PETITIONER to each of the following:

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