

1996

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

Utah Court of Appeals

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Aaron J. Prisbrey; Attorney for Petitioner.

Lorin R. Blauer; K. Allan Zabel; Attorneys for Respondent.

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF PETITIONER

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

**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 960083-CA

Lorin R. Blauer #0366

K. Allan Zabel #3598

Attorneys for Respondent

Board of review of the Industrial
Commission of Utah, Department of
Employment Security

140 East 300 South

P.O. Box 45244

Salt Lake City, UT 84145-0244

Aaron J. Prisbrey #6968
Attorney for Petitioner
148 East Tabernacle
St. George, Utah 84770

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Marilyn M. Branch
Clerk of the Court

PARTIES TO THE PROCEEDING

MARY SASSIN
3902 WEST 165 NORTH 308-12
HURRICANE, UT 84737

THE FRICK COMPANY
FOR WALMART STORES INC.
P.O. BOX 283
ST. LOUIS MO 63166-0283

INDUSTRIAL COMMISSION OF UTAH
BOARD OF REVIEW
DEPARTMENT OF EMPLOYMENT SECURITY
P.O. BOX 45244
SALT LAKE CITY, UT 84145-0244

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Respondents.

Case No. 960083-CA

BRIEF OF PETITIONER

APPELLATE JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to UTAH CODE ANN. § 63-46b-16(1).

STATEMENT OF THE ISSUES

ISSUE 1

Was the determination by the Board of Review of the Industrial Commission of Utah, Department of Employment Security, (hereinafter the "Board") that it is a reasonable employment practice to require a switchboard operator to walk 100 feet to get a drink of water reasonable?

STANDARD OF REVIEW

The determination whether the Board's decision relative to whether an individual is discharged for just cause will be reviewed under UTAH CODE ANN. § 63-46b-16(4)(h)(i) for reasonableness. Albertsons Inc. v. Dept. of Employment Security, 854 P.2d 570, 573 (Utah App. 1993).

PRESERVATION OF THE ISSUE

(R. 56-57, 17, 30).

ISSUE 2

Was the Board's failure to consider Petitioner's contention, that the employer never showed the element of knowledge, arbitrary or capricious?

STANDARD OF REVIEW

This is a legal determination that requires no deference to the Commission pursuant to UTAH CODE ANN. § 63-46b-16(4)(h). Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

PRESERVATION OF THE ISSUE

R. 57-59, 16, 24, 29-30).

ISSUE 3

Was the Board's failure to consider Petitioner's contention, that the employer never showed the element of control, arbitrary or capricious?

STANDARD OF REVIEW

This is a legal determination that requires no deference to the Commission pursuant to UTAH CODE ANN. § 63-46b-16(4). Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

PRESERVATION OF THE ISSUE

(R. 59, 30).

ISSUE 4

Was the Board's failure to consider Petitioner's contention, that the employer never showed the actions of Petitioner had a serious effect on the employee's job or the employer's interests, arbitrary or capricious?

STANDARD OF REVIEW

This is a legal determination that requires no deference to the Commission pursuant to UTAH CODE ANN. § 63-46b-16(4). Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

PRESERVATION OF THE ISSUE

(R. 59-60, 36).

ISSUE 5

Was the Board's failure to consider Petitioner's contention, that the employer never met its burden because the only evidence the employer presented was inadmissible hearsay, arbitrary or capricious?

STANDARD OF REVIEW

This is a legal determination that requires no deference to the Commission pursuant to UTAH CODE ANN. § 63-46b-16(4). Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

PRESERVATION OF THE ISSUE

(R. 60-63, 13, 39, 5, 13, 16-18).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 562-5b-102(1)(a), Utah Administrative Code
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Rule 562-5b-102(1)(c)(3), Utah Administrative Code
Rule 562-5b-103(1), Utah Administrative Code
Rule 562-5b-108(1)(a), Utah Administrative Code

STATEMENT OF THE CASE

NATURE OF THE CASE

This case is before the Court on petition to review an order of the Department of Employment Security administrative agency.

COURSE OF PROCEEDINGS

Petitioner was fired by WalMart. She applied for, and received, unemployment benefits. That decision was overturned by Department of Employment Security Administrative Law Judge Terry J. Kump (Hereinafter "ALJ") and affirmed by the Board. It is from that decision Petitioner appeals to this Court.

DISPOSITION IN THE AGENCY

The Board issued a final decision on January 5, 1996. The Board affirmed the decision of the ALJ in all respects denying Petitioner unemployment benefits. However, the Board reversed the ALJ relative to the repayment of unemployment benefits. The Board ordered Petitioner repay the benefits pursuant to UTAH CODE ANN. § 35-4-406(5) instead of UTAH CODE ANN. § 35-4-406(4) as had been ordered by the ALJ. (R.71-75).

STATEMENT OF FACTS

1. Petitioner was hired by WalMart Stores on or about November 8, 1990. (R. 1).
2. Petitioner was fired on or about August 1, 1995. (R. 1).
3. Petitioner is a 57 year old woman (R. 1).
4. Petitioner, at the time of firing, was a telephone switchboard operator working eight hours a day. (R. 15).
5. Petitioner filed for unemployment insurance benefits on August 3, 1995. (R. 2-4).

6. A Department of Employment Security representative found Petitioner was not at fault in the discharge and granted Petitioner unemployment insurance benefits on August 18, 1995. (R. 4).

7. WalMart, through the Frick Company, appealed the granting of unemployment insurance benefits on or about August 28, 1995. (R. 7).

8. WalMart's appeal was heard by ALJ, Terry J. Kump on October 11, 1995, at hearing in St. George, UT. (R. 12).

**FACTS RELEVANT TO ISSUE 1
(Reasonableness of policy)**

9. The employer representative testified that Petitioner was fired for having a drink of water in the phone area contrary to store policy. (R. 18-19).

10. The employer representative testified that Petitioner could get water by walking a distance of about 100 feet into a back room. (R. 17).

11. Petitioner testified it was not easy to go into the back room to get a drink of water. (R. 20).

12. 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." (R. 38).

13. The Board affirmed the decision of the ALJ in this regard. (R. 73).

FACTS RELEVANT TO ISSUE 2
(Knowledge)

14. The employer representative testified that the employee manual states that it is unacceptable to have food or drink on the floor area. (R. 16).

15. The employer representative admitted that Petitioner's work area was separate from the customer flow area. (R. 29).

16. Petitioner testified that her work area was not on the floor area. (R. 24-25).

17. The employer representative testified that many employees had drinks in the area where Petitioner had her drink. (R. 30).

18. The employer representative testified that Petitioner was the only employee ever fired for having a drink of water in the phone area. (R.30).

19. Petitioner testified she was not the only phone operator who had water in the phone area. (R. 23).

20. Petitioner testified she was fired because of a prior problem with the employer representative. (R. 20).

21. Based on these facts, the ALJ found that Petitioner had the requisite knowledge of the drink policy. (R.38).

22. Petitioner specifically appealed the ALJ's determination that the facts supported a finding of the requisite knowledge of the drink policy. (R. 57-59).

23. In it's decision, the Board never addressed the issue of whether the element of knowledge of the drink policy was shown by the employer. (R. 71-75).

**FACTS RELEVANT TO ISSUE 3
(Control)**

24. Petitioner testified she had the drink in a phone area, in part, because of a strep infection from which she was suffering. (R. 20).

25. In his decision, the ALJ made no determination of whether the element of control was shown. (R. 35-40).

26. Petitioner specifically appealed this issue to the Board, arguing that due to the strep infection, Petitioner did not have the requisite control. (R. 59).

27. In it's decision, the Board never addressed the issue of whether the element of control was shown by the employer. (R. 71-75).

**FACTS RELEVANT TO ISSUE 4
(Serious effect on employer)**

28. The ALJ found that the employer provided no evidence that it had been harmed in any way by Petitioner's conduct. (R. 36).

29. However, the ALJ nevertheless ruled in favor of the employer, stating that harm was shown. (R. 39).

30. Petitioner specifically appealed this issue to the Board, arguing the employer failed to show how Petitioner's actions had an adverse effect on the employee's job or the employer's interest and that the ALJ's decision was not consistent with his findings. (R. 59-60).

31. In it's decision, the Board never addressed the issue of whether the employer showed the actions of Petitioner had a serious

effect on the employee's job or the employer's interests. (R. 71-75).

**FACTS RELEVANT TO ISSUE 5
(Employer's burden)**

32. The ALJ found that WalMart failed to provide the necessary documentation prior to hearing, but went ahead with the hearing stating that his decision would be based on the testimony. (R. 13).

33. The employer representative had little knowledge of the events regarding Petitioner's discharge and requested the court permit the reading of several employee statements. (R. 16).

34. The court specifically ruled the statements to be inadmissible. (R. 16-17)

35. The employer representative testified regarding the statements which the Court had ruled were inadmissible. (R. 17-18).

36. Petitioner specifically appealed this issue to the Board, arguing that the hearsay testimony was insufficient to meet the employer's burden. (R. 60-63).

37. In it's decision, the Board never addressed the issue of whether the employer met its burden in establishing just cause. (R. 71-75).

38. On or about January 30, 1996, Petitioner filed a petition for writ of review with this court, seeking review of the decision of the Board. (R. 79-80).

SUMMARY OF ARGUMENT

The Employer's policy requiring switchboard operators walk 100 feet for a drink of water is an unreasonable employment practice. The determination by the Board that it is a reasonable employment practice, should be reversed. 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.

ARGUMENT

I. IT IS NOT A REASONABLE EMPLOYMENT PRACTICE TO REQUIRE A SWITCHBOARD OPERATOR TO WALK 100 FEET TO GET A DRINK OF WATER.

Petitioner is a 57 year old female who was hired by WalMart Stores on or about November 8, 1990. She was fired on or about August 1, 1995. (R. 1). Petitioner was fired for having a drink of water in the phone area. (R. 18-19). At the time of firing, Petitioner was a telephone switchboard operator. (R. 15).

At hearing, Petitioner testified that "I did have strept [sic] throat as well as a virus and it was very hard to spend so many hours without a drink and when he says it was easy for me to go back and get a drink off the sales floor was not." (R. 20).

The employer representative testified that "[a]ny time she wanted to get a drink of water, we made it available to her. She could go right inside the backroom, which is **only about a hundred feet away** from the fitting room. . . ." (R. 17). (Emphasis added).

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." (R. 38).

Petitioner specifically appealed this holding to the Board, asserting that requiring Petitioner walk 100 feet to get a drink of water when her mouth would become dry from answering phones was not a reasonable employment practice. (R. 56-57).

In affirming the ALJ, the Board stated:

The Board of Review is of the opinion that the employer's policy may have been excessively harsh for the period that the claimant had strep throat. However, as noted above, the problem had been going on for several months. The claimant did not simply violate the policy during the time she had strep throat. If the claimant had shown a willingness to comply with the policy prior to the time she developed strep throat, the Board of Review would be more persuaded by her arguments that she needed the water close at hand during the time she had strep throat that the employer should reasonably have made an exception for her during that time." (R. 73).

It is Petitioner's contention that the employer's policy was excessively harsh regardless of whether Petitioner had a strep infection. The fact she may have also been ill is of little consequence, relative to the issue of whether the policy is an unreasonable employment practice. Requiring a phone operator to walk a distance of 100 feet for a drink of water is simply not reasonable, and does not support a finding of just cause for discharge.

In reviewing the Board's determination of just cause, the appellate court will determine whether the Board's decision was reasonable pursuant to UTAH CODE ANN. § 63-46b-16(4)(h)(i);

Albertsons Inc. v. Dept. of Employment Security, 854 P.2d 570, 573 (Utah App. 1993).

The decision of the Board in this situation was not reasonable. Rule 562-5b-102(1)(a), Utah Administrative Code states:

(a) Culpability.

This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. **A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices.** . . . (Emphasis added).

Rule 562-5b-108(1)(a), Utah Administrative Code, further states:

The reasonableness of the employer's rules will depend on the necessity for that rule as it affects the employer's interests. **Rules which are contrary to general public policy or which infringe upon the recognized rights and privileges of individuals may not be reasonable.** An employer must have broader prerogatives in regulating conduct when employees are on the job than when they are not. An employer must be able to make rules for employee on-the-job conduct that reasonably further the legitimate business interests of the employer. An employer is not required to impose only minimum standards, but **there may be some justifiable cause for violations of rules that are unreasonable or unduly harsh, rigorous or exacting.** . . . (Emphasis added).

Here Petitioner worked eight hours a day as a switchboard operator. (R. 15). Regardless of whether she had an illness, the policy she walk 100 feet to get a drink of water was unreasonable. Petitioner's mouth would get dry answering the switchboard. If she got up and walked 100 feet to a back room to get a drink of water every time her mouth was dry, she simply could not answer the phones as necessary.

The requirement Petitioner answer the phone as well as walk 100 feet every time her mouth became dry is inconsistent if not impossible. Such a requirement clearly runs contrary to general public policy and infringes upon Petitioner's recognized rights and privileges. For that reason, employer's policy was not consistent with reasonable employment practices and the decision of the Board should be reversed as being unreasonable.

II. THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THE EMPLOYER NEVER SHOWED THE ELEMENT OF KNOWLEDGE WAS ARBITRARY AND CAPRICIOUS.

The employer representative testified that the employee manual states that it is unacceptable to have food or drink on the **floor area**. (R. 16). (Emphasis added). However, he admitted that Petitioner's work area was separate from the customer flow area. (R. 29). Petitioner testified that her work area was not on the floor area. (R. 24-25).

The employer representative further testified that many employees had drinks in the area where Petitioner had her drink. (R. 30). He also testified that Petitioner was the only employee ever fired for having a drink of water in the phone area. (R.30).

Petitioner testified she was not the only phone operator who had water in the phone area. (R. 23). She also testified she was fired because of a prior problem with the employer representative. (R. 20).

In spite of foregoing facts, the ALJ found Petitioner had the requisite knowledge of the store policy. (R. 38). Petitioner

specifically appealed that decision to the Board. In her "Memorandum in Support of Appeal," (R. 53-66) Petitioner argued as follows:

The employee must have had a knowledge of the conduct which the employer expected . . . Knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior. If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown. Rule 562-5b-102(1)(b), Utah Administrative Code. [R. 57-58].

Here there was no clear explanation of the policy. Claimant was initially allowed to take drinks into the fitting room. At some point in time, the Employer decided to reverse this policy in favor of the company handbook regarding such behavior. The handbook states that "eating food, drink, or chewing gum while on the **sales floor** is unacceptable behavior." (Transcript of hearing at page 4). [R. 16] (Emphasis added). [R. 58].

Claimant testified the area where she answered phones was not in the general customer area, specifically stating that "it was not out on the floor". (Transcript of Hearing at page 12). [R. 24]. This testimony was actually supported by the Employer representative who testified that the area in which Claimant was working is separated from the regular customer flow area. [R. 58] (Transcript of hearing at page 17). [R. 29].

Actions of other employees shows there was no coherent policy regarding beverages in Claimant's work area. This is born out by Claimant's testimony that there were numerous other employees who were taking beverages into the phone area. [R. 58] (Transcript of Hearing at page 18). [R. 30].

The Employer manual implies it is acceptable to have beverages in the non-floor areas. Claimant did not work out on the floor. Therefore, it is questionable Employer even had a company policy regarding drink in the phone area of which Claimant would have knowledge. [R. 58].

At best Employer's policy was unclear, ambiguous or inconsistent. The employee manual implies it is perfectly acceptable to have beverages in the non-floor areas. The purported verbal policy regarding beverages in the non-floor areas is inconsistent with that policy.

That is born out by Claimant's testimony that many employees had beverages in the phone area. This policy, if it did exist, was so inconsistent and ambiguous that the employees could not have knowledge. [R. 59].

In it's decision, the Board never addressed the issue of whether the element of knowledge was shown by the employer. (R. 71-75).

This Court has held that:

The question of whether the Commission's action constitutes arbitrary action for want of adequate findings is governed by our determination of whether this court is able to conduct a meaningful review. Whether the findings are adequate is therefore a legal determination that requires no deference to the Commission.

Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

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.

III. THE BOARD'S FAILURE TO CONSIDER PETITIONER'S ARGUMENT THE EMPLOYER NEVER SHOWED THE ELEMENT OF CONTROL WAS ARBITRARY AND CAPRICIOUS.

Petitioner testified she had a drink in the phone area, in part, because of a strep infection from which she was suffering. (R. 20). The ALJ, while finding that Petitioner was discharged for cause, made no finding regarding control on the part of Petitioner. (R. 35-40). Therefore, Petitioner appealed to the Board on the basis she did not have the requisite control to abide by the drink

policy because of the strep infection. (R. 59). In her "Memorandum in Support of Appeal," (R. 53-66) Petitioner argued as follows:

In defining control, Rule 562-5b-102(1)(c)(2), Utah Administrative Code states:

Just cause **may not** be established when the reason for discharge is based on mere mistakes, inefficiency, failure of performance as the result of inability or incapacity, inadvertence, in isolated instances, good faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence. (Emphasis added) [R. 57].

In this situation, Claimant had a drink of water in an area not frequented by patrons. Many other employees did the same thing. The policy regarding drinks in Claimant's work area, were at best, ambiguous and vague. She had a strep infection and was answering phones causing her mouth to become dry. This may be classified as a good faith error in judgment. However, it is not sufficient to discharge for cause. [R. 57].

In it's decision, the Board never directly addressed the issue of whether the element of control was shown by the employer. (R. 71-75).

Petitioner's "Memorandum in Support of Appeal" clearly set forth the relevant facts and authority regarding the issue of control. (R. 59). Since the Board's decision makes no reference to this element, its decision should be reversed as being arbitrary and capricious pursuant to Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

IV. 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.

In his findings, the ALJ determined that the employer provided no evidence that it had been harmed in any way by Petitioner's conduct. (R. 36). Nevertheless, the ALJ stated that the employer had been harmed. (R.39). Because of these inconsistencies, Petitioner appealed to the Board the issue of whether the employer had showed whether Petitioner's actions had a serious effect on the employee's job or the employer's interest. (R. 59-60). In her "Memorandum in Support of Appeal," (R. 53-66) Petitioner argued as follows:

The employer has the burden of showing that "such acts have a serious effect on the employee's job or the employer's interests. Rule 562-5b-102(1)(c)(3), Utah Administrative Code. [R. 59-60].

There is no evidence in the transcript of there being an adverse effect on the Employer because of Claimant's conduct. In fact, the ALJ stated:

"The information provided by the employer representative cited only that the claimant had a drink container in the work area but the representative did not offer any information as to how the employer was harmed by the claimant's actions or to show the claimant had received any warnings or disciplinary action for her conduct." [R. 60]. (Exhibit "F" at page 2). [R. 36].

The decision of the ALJ is very confusing in this regard. The evidence presented does not support the Employer's claim. The ALJ even points this out, but then goes on and rules in favor of the Employer. The findings by the ALJ and resulting decision are clearly contrary to existing law, and the decision should be reversed. [R. 60].

In it's decision, the Board never addressed the issue of whether the employer showed the actions of Petitioner had a serious effect on the employee's job or the employer's interests. (R. 71-75).

Petitioner's "Memorandum in Support of Appeal," clearly set forth the relevant facts and authority regarding the issue of whether Petitioner's conduct had an serious effect on the employee's job or the employer's interests. (R. 59). Since the Board's decision makes no reference to this issue, its decision should be reversed as being arbitrary and capricious pursuant to Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

V. 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.

The ALJ found that WalMart failed to provide the necessary documentation prior to the hearing, but went ahead with the hearing stating that his decision would be based on the testimony at hearing. (R. 13) The employer representative had little knowledge of the events regarding Petitioner's discharge and requested the court permit the reading of several employee statements. (R. 16). The court specifically ruled the statements to be inadmissible. (R. 16-17) Nevertheless, the employer representative testified regarding the statements which the Court had already ruled to be inadmissible. (R. 17-18).

Based on the foregoing facts, Petitioner appealed to the Board, arguing the evidence produced by the employer failed to meet the requisite burden. (R. 60-63).

In her "Memorandum in Support of Appeal," (R. 53-66) Petitioner argued as follows:

It is well established that the employer shoulders the burden of proof in establishing just cause for discharge.

The employer has the burden of proof which is the responsibility to establish the facts resulting in the discharge. The Employer is required by Subsection 35-4-11(7)(a) to keep accurate records and to provide correct information to the Department for proper administration of the Act.

Rule 562-5b-103(1), Utah Administrative Code. [R. 60].

As this section indicates, the employer is required to keep adequate records and provide necessary information to the Department. However, that was not done in this situation. At hearing the ALJ stated:

I have reviewed through the information in the record. I can't read the employer's information, I don't have a really too much of an idea that they gave the department originally; however, in their appeal, they keep referring to the Claimant as "he" and I don't understand that at all. [R. 60-61].

(Transcript of Hearing at page 1) [R. 13].

The failure of the employer to provide information to the department was further addressed in the ALJ's decision. There he stated:

[T]he employer representative failed to offer the Department comprehensive information regarding the three elements of just cause in the decision. This representative has been involved in providing unemployment benefits to this Department for several years and the representative knows the necessity of providing complete and comprehensive information to the Department." [R. 61].

(Exhibit "F" at page 5). [R. 39].

Information provided the St. George Job Service office was equally lacking. In responding to the Employer Notice of Claim Filed, the Employer did not respond to questions 1, 2, 3a, 3c, 3d, 3e, 4 or 5. [R. 61]. (See, Exhibit "B"). [R. 5].

Due to the failure of the Employer to provide information prior to hearing, the ALJ made his decision based solely on information provided at hearing:

So, I wondered if there was some confusion here but what I'm going to do and I want . . . I guess the point I'm trying to make is, what is given to me today in this hearing is what I will be basing my decision on, not so much what's in this record. The record gives me an idea of what the department has made their ruling on and some general information but I will not be basing the decision on this record but on what is said here today. [R. 61].

(Transcript of hearing at page 1). [R. 13].

WalMart's representative had limited knowledge of the circumstances regarding Claimant's discharge. Therefore, he requested the ALJ allow him to read statements from WalMart management regarding Claimant's alleged conduct. (Transcript of hearing at page 4). [R. 16].

The ALJ informed the Employer representative the statements were hearsay stating "I won't allow it". (Transcript of hearing at pages 4-5). [R. 16-17].

Nevertheless, the most damning portion of the representative's testimony were the hearsay statements the ALJ had already ruled inadmissible. The statements alleged Claimant was told on many occasions to not have any drink in the phone area. The representative testified as follows:

I have a statement from Mar . . . from Peggy Stapley, who was the Assistant Manager in Charge and it was told to Mary about two to three months prior to when we let her go. [R. 62].

(Transcript of Hearing at page 5). [R. 17].

And Janette Collins, I have a statement from her, who was also an Assistant Manager, who also talked to Mary specifically about not having it in there. [R. 62].

(Transcript of Hearing at page 6). [R. 18].

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." [R. 62].

(Transcript of Hearing at page 6). [R. 18].

While Claimant denied these allegations, she had no opportunity to confront the individuals who made these alleged statements. [R. 62-63].

In this situation the Employer provided the Department with almost no information prior to hearing, though required to do so. The Employer representative present at the hearing had limited knowledge regarding the facts of the case. The basis of his testimony was hearsay the ALJ had ruled inadmissible. As stated previously, the burden of proof is the Employer's. The lack of information provided prior to hearing and the hearsay provided by the Employer representative clearly failed to satisfy the Employer burden of proof in this case. [R. 63].

In it's decision, the Board never addressed the issue of whether the employer met its burden in establishing just cause for discharge (R. 71-75).

Petitioner's "Memorandum in Support of Appeal" clearly set forth the relevant facts and authority regarding the issue of whether the employer met its burden. (R. 60-63). Since the Board's decision makes no reference to this issue, its decision should be reversed as being arbitrary and capricious pursuant to

Adams v. Board of Review of Indus. Com'n, 821 P.2d 1, 4 (Utah App. 1991).

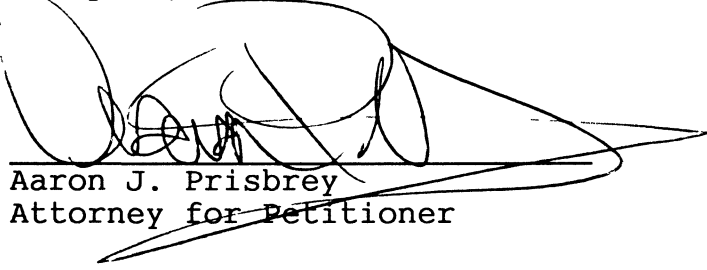
CONCLUSION

It is well established that the Employment Security Act should be liberally construed and administered to lighten the burdens of the unemployed. Johnson v. Board of Review, 7 Utah 2d 113, 117-18; 320 P.2d 315 (1958). The decision of the Board does not lighten the burdens of Petitioner.

The determination Employer's policy requiring switchboard operators walk a distance of 100 feet for a drink of water is not a reasonable employment practice and certainly did not lighten Petitioner's burden. The Board's determination was unreasonable and should be reversed.

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.

DATED this 10th day of April, 1996.



Aaron J. Prisbrey
Attorney for Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that on this 10th day of April, 1996, I did personally mail two copies of the above and foregoing BRIEF OF PETITIONER to each of the following:

THE FRICK COMPANY
FOR WALMART STORES INC.
P.O. BOX 283
ST. LOUIS MO 63166-2083

LORIN R. BLAUER
K. ALLAN ZABEL
Attorneys for Respondent
Board of review of the Industrial
Commission of Utah, Department of
Employment Security
140 East 300 South
P.O. Box 45244
Salt Lake City, UT 84145-0244

A large, stylized handwritten signature in black ink, appearing to read 'Lorin R. Blauer', is written over a horizontal line. The signature is highly cursive and loops around the line.

ADDENDUM

Rule 562-5b-102(1)(a), Utah Administrative Code.

(a) Culpability.

This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices. The wrongfulness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

Rule 562-5b-102(1)(b), Utah Administrative Code.

(b) Knowledge.

The employee must have had a knowledge of the conduct which the employer expected. It is not necessary that the claimant intended to cause harm to the employer, but he should reasonably have been able to anticipate the effect his conduct would have. Knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a pertinent written policy, except in the case of a flagrant violation of a universal standard of behavior. If the employer's expectations are unclear, ambiguous or inconsistent, the existence of knowledge is not shown. A specific warning is one way of showing that the employee had knowledge of the expected conduct. After the employee is given a warning he should be given an opportunity to correct objectionable conduct. Additional violations occurring after the warning would be necessary to establish just cause for a discharge.

Rule 562-5b-102(1)(c)(2), Utah Administrative Code.

Just cause may not be established when the reason for discharge is based on mere mistakes, inefficiency, failure of performance as the result of inability or incapacity, inadvertence, in isolated instances, good faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence. These examples of conduct are not disqualifying because of the lack of knowledge or control. However, continued inefficiency, repeated carelessness, or lack of care exercised by ordinary, reasonable workers in similar circumstances, may be disqualifying depending on the reason and degree of the carelessness, the knowledge and control of the employee.

Rule 562-5b-102(1)(c)(3), Utah Administrative Code.

The term "just cause" as used in Subsection 35-4-5(2)(a) does not lessen the requirement that there be some fault on the part of the employee involved. Prior to the 1983 addition of the term "just cause" the Commission interpreted Subsection 5(2)(a) to require an intentional infliction of harm or intentional disregard of the employer's interests. The intent of the Legislature in adding the words "just cause" to Subsection 35-4-5(2)(a) was apparently to correct this restrictive interpretation. While some fault must be present, it is sufficient that the acts were intended, the consequences were reasonably foreseeable, and that such acts have a serious effect on the employee's job or the employer's interests.

Rule 562-5b-103(1), Utah Administrative Code.

The employer has the burden of proof which is the responsibility to establish the facts resulting in the discharge. The Employer is required by Subsection 35-4-11(7)(a) to keep accurate records and to provide correct information to the Department for proper administration of the Act. Although the employer has the burden to establish just cause for the discharge, if sufficient facts are obtained from the claimant, a decision will be made based on the information available. The failure of one party to provide information does not necessarily result in a ruling favorable to the other party.

Rule 562-5b-108(1)(a), Utah Administrative Code.

The reasonableness of the employer's rules will depend on the necessity for that rule as it affects the employer's interests. Rules which are contrary to general public policy or which infringe upon the recognized rights and privileges of individuals may not be reasonable. An employer must have broader prerogatives in regulating conduct when employees are on the job than when they are not. An employer must be able to make rules for employee on-the-job conduct that reasonably further the legitimate business interests of the employer. An employer is not required to impose only minimum standards, but there may be some justifiable cause for violations of rules that are unreasonable or unduly harsh, rigorous or exacting. When rules are changed, adequate notice and reasonable opportunity to comply must be afforded. If the employee believes a rule is unreasonable, he has the responsibility to discuss concerns with the employer and give the employer an opportunity to take corrective action.