

1985

# Logan Regional Hospital v. Board of Review of the Industrial Commission of the State of Utah, Department of Employment Security and Abdul H. Dailami : Brief of Appellant

Utah Supreme Court

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David L. Wilkinson; Attorney General; K. Allan Zabel; Special Assistant Attorney General; Attorneys for Respondents.

Larry R. White; Kirton, McConkie and Bushnell; Attorneys for Appellant.

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1987

20781

1985

IN THE SUPREME COURT OF THE STATE OF UTAH

LOGAN REGIONAL HOSPITAL,  
Plaintiff and Appellant,

vs.

BOARD OF REVIEW OF THE  
INDUSTRIAL COMMISSION OF  
THE STATE OF UTAH, DEPARTMENT  
OF EMPLOYMENT SECURITY and  
ABDUL H. DAILAMI,

Defendants and Respondents.)

Case No. 20781

BRIEF OF APPELLANT

Appeal from a decision of the Board of Review of the  
Industrial Commission, State of Utah, upholding the decision of  
the Administrative Law Judge who reversed the decision of the  
Department of Employment Security, State of Utah,  
denying unemployment compensation.

David L. Wilkinson  
ATTORNEY GENERAL

K. Allan Zabel  
SPECIAL ASSISTANT  
ATTORNEY GENERAL  
1234 South Main  
Salt Lake City, Utah 84147  
Attorneys for Respondents

Larry R. White  
KIRTON, MCCONKIE & BUSHNELL  
330 South Third East  
Salt Lake City, Utah 84111  
Attorney for Appellant

FILED

EP 24 1985

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  )  
BOARD OF REVIEW OF THE                    )  
INDUSTRIAL COMMISSION OF                )  
THE STATE OF UTAH, DEPARTMENT        )  
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ATTORNEY GENERAL

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ATTORNEY GENERAL  
1234 South Main  
Salt Lake City, Utah 84147  
Attorneys for Respondents

Larry R. White  
KIRTON, MCCONKIE & BUSHNELL  
330 South Third East  
Salt Lake City, Utah 84111  
Attorneys for Appellant

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### STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the Board of Review act in an arbitrary and capricious fashion in failing to consider the employee's continued negligence, repeated accumulated errors, and numerous acts of failure to properly perform his work as being disqualifying conduct sufficient to constitute willful or wanton conduct adverse to the employer's rightful interest under U.C.A. §35-4-5(b)(1)? [See Martin v. Dept. of Employment Sec., 682 P.2d 308 (Ut. 1984).]

2. Did the Board of Review commit reversible error in failing to consider the continued inefficiency, repeated carelessness, lack of care and accumulated errors of the employee as sufficient to constitute "just cause"? [See Department of Employment Security Rules and Regulations, Section A71-07-1:5(A)(5).]

3. Has the Department of Employment Security properly defined "just cause" in its determination of the nature of the acts of the respondent employee?

4. Was the appellant denied due process when the Board of Review failed to provide it with a copy of respondent Dailami's brief, which failure appellant could only discover after reviewing a copy of the appeal record?

### STATEMENT OF THE CASE

The employee-respondent, Abdul Dailami, was discharged as a boiler operator at Logan Hospital for just cause on January 30, 1985. The employee was initially denied unemployment compensation



benefits pursuant to Utah Code Annotated, §35-4-5(b)(1), in a decision from the Department of Employment Security dated February 20, 1985, for the reason he was terminated for just cause (Record pg. 0176). He appealed the initial decision of this Department on February 25, 1985. Subsequently, a hearing was held before an Administrative Law Judge on March 20, 1985, who reversed the decision of the Department, holding that the employee was not discharged for just cause and awarding the claimant unemployment compensation benefits (Record pp. 0120 - 0121). This decision was upheld by the Board of Review of the Industrial Commission of Utah in its decision dated May 10, 1985 (Record pp. 008 - 0010).

#### STATEMENT OF FACTS

The facts are well-established in the record consisting in part of the transcript of the hearing before the Administrative Law Judge (Record (hereinafter Rec.) pp. 0122 - 0140), the exhibits received on the date of the hearing before the ALJ, including the two written reprimands given Mr. Dailami prior to his termination (Rec. 0146 and 0157 - 0164), both of which were received by Mr. Dailami (Rec. 0087, 0089 and 0146), and the affidavits of Mr. Dailami's supervisor, Dennis Ostermiller, and two witnesses (Rec. 0084 - 0090).

As noted by the ALJ in his opinion, the final episode after at least three other incidents and "two disciplinary counseling actions and a reprimand" (Rec. 0120) (there were actually two

reprimands - see Rec. 0146 and 0157 - 0164) which finally resulted in the employee's dismissal was the unscheduled repair of a leaking valve which involved the shutdown of the entire water system for Logan Hospital (Rec. 0120 and 0126). Because of the employee's failure to assure that the by-pass valve was properly monitored, the water supply for the hospital was interrupted (Rec. 0126).

As evidenced by the testimony of the employee's supervisor, Mr. Dennis Ostermiller, at the hearing (Rec. 0125 - 0131) as well as two written reprimands for previous equipment shutdowns and other instances of failure to perform duties, dated September 2, 1983 (Rec. 0146), and September 11, 1984 (Rec. 0157 - 0164), the cut-off of the hospital's water supply on January 14, 1985, was merely the culminating event in a history of similar incidents of negligence, poor work performance, failure of the employee to perform assigned duties, and violations of hospital policies (see Rec. 0125 - 0131).

The repeated incidents are well-documented in the written reprimands as well as the oral references by Mr. Ostermiller.

In addition to the January 14, 1985, incident, those situations involving the interruption of critical services to the hospital are as follows:

1. On July 29, 1983, the employee shut off the two cooling towers (Rec. 0146, 0085).

2. The employee-respondent, on September 1, 1983, again shut down the two cooling towers for the hospital (Rec. 0146, 0085).

3. In the winter of 1983, without prior notification, the employee turned off the boiler, resulting in total loss of steam for the building (Rec. 0146, 0085).

4. On at least two instances on unspecified dates there was a total loss of hot water at the hospital due to employee's inability to repair water heaters (Rec. 0085, 0161).

5. During a repair in 1983, the employee failed to put the medical air compressor on by-pass with the result that there was a loss of respiratory air in the hospital. This could have resulted in the death of a patient had anyone been on a respirator at the time (Rec. 0085, 0161 - 0162).

In addition, the employee failed to perform or complete the following maintenance or repairs as instructed:

1. Mr. Dailami failed to replace the steam trap in the pharmacy and failed to replace a steam valve in the engineering shop (Rec. 0086, 0157 - 0158).

2. Despite repeated requests, Mr. Dailami failed to repair the number one chilled water circulating pump (Rec. 0086, 0158).

3. The employee failed to replace or repair pop-off valves (Rec. 0086, 0158).

4. The employee took almost two years (August 1982 - July 1984) to repair the number one water heater for the hospital (Rec. 0086, 0158).

5. It took the employee from the spring of 1984 to June of 1984 to repair a boiler problem (Rec. 0158).

6. After the employee's departure, it was discovered that he had failed to properly maintain anti-corrosive chemical levels in the hospital boiler and steam system, resulting in excessive corrosion. He was admonished about this while still at the hospital (Rec. 0086, 0160).

Finally, Mr. Dailami showed an inability to diagnose or repair equipment in the following instances:

1. Failure through June 1984 to diagnose a de-aerator temperature control problem (Rec. 0087, 0159).

2. Failure to diagnose a proof of closure switch problem on boilers in 1983 as well as 1984 (Rec. 0159, 0160).

3. Failure to diagnose heat control problems on number one and number two water heaters in 1983 and 1984 (Rec. 0158, 0159).

4. Failure to diagnose a medical air compressor unloader valve malfunction (Rec. 0087, 0160).

5. Failure in early 1984 to diagnose a pneumatic air compressor bearing problem (Rec. 0087, 0160).

6. Failure to properly repair number 2 heat pump (Rec. 0160).

7. Failure in the summer of 1983 to repair an autoclave as requested (Rec. 0187).

Evidence of all the above-stated facts were presented to the ALJ in either oral testimony or in written exhibits and were available to the Board of Review. Nevertheless, the ALJ as well as

the Board of Review ignored reference to these accumulated, repeated and numerous failings and errors of the employee-respondent, characterizing them as "isolated incidents" (Rec. 0009, 0121).

Finally, in an act discovered only after this appeal was filed and the record examined, it was learned that although a copy of appellant's brief was sent by the Department of Employment Security to the employee-respondent (Rec. 0082), the Department did not provide the appellant, Logan Hospital, with a copy of the materials which were the equivalent of respondent's brief that Mr. Dailami filed with the Department of Employment Security (Rec. 0016 - 0081).

#### SUMMARY OF ARGUMENT

Judging from the decision of the Board of Review and the ALJ, it appears that their interpretation of "just cause" is that unless an employee performs a "willful or wanton act," the employer must accept sloppy, negligent, substandard performance and continue to employ error-prone persons, and discharge will require the employer to pay unemployment compensation benefits. The appellant maintains "just cause" for discharging an employee can and should be the employee's inability to meet the standards and procedures of the employer which are known to the employee. Furthermore, the appellant maintains that violations, mistakes, and accidents can accumulate, as they did in the case of Mr. Dailami, until the totality of the repeated nature of the conduct constitutes either willful or

wanton conduct as specified in Martin v. Dept. of Employment Sec., 682 P.2d 308 (Ut. 1984), or "just cause" for discharge, rendering the employee ineligible for unemployment compensation. The proposed Rules and Regulations of the Industrial Commission, §A71-07-1: 5(A)(5), specifically provide that "continued inefficiency, repeated carelessness, or lack of care exercised by ordinary, reasonable workers in similar circumstances," may be disqualifying as far as unemployment compensation is concerned. Notwithstanding this language, this aspect of "just cause" was totally ignored by the Board of Review.

The Administrative Law Judge in hearing the respondent's case admitted that there had been prior occasions involving equipment shutdowns (Rec. 0120). In the findings of fact the ALJ also determined there had been prior reprimands, although there was no reference to other conduct adverse to the interest of employer, but reference only to the prior equipment shutdowns (Rec. 0120). Notwithstanding these factors and the fact that the Utah State Legislature in 1983 amended the Utah Code in Utah Code Annotated §35-4-5(b)(1) to add another reason separate and apart from "deliberate, willful or wanton conduct adverse to the employer's rightful interest," to-wit "just cause", the ALJ ignored the continued and repeated nature of the employee's conduct as sufficient to constitute either "willful or wanton conduct" or "just cause" and denied and reversed the Department's initial decision that the employee had been fired for just cause.

The Board of Review also failed or refused to consider the continued, repeated and accumulated nature of respondent's errors, referring to them as "isolated instances" (Rec. 0009), not considering the fact that in Martin v. Dept. of Employment Sec., supra, this Court admitted that "repeated acts of negligence" could rise to the level of "deliberate, willful or wanton" conduct or that continued inefficiency, repeated carelessness or lack of due care is sufficient to constitute "just cause" under U.C.A. §35-4-5(b)(1) and the Rules and Regulations of the Department of Employment Security, Section A71-07-1:5(A)(5).

The Board of Review in its decision ignored the 18 incidents of negligence, inefficiency or the employee's failure to perform his duties referred to in the record and mentioned only four instances of the respondent's failure to perform his responsibilities. These numerous incidents were characterized as "isolated instances," and it was claimed that most of these incidents occurred in 1983. The Board of Review apparently felt that the standard should be that the employer is under a legal obligation to blot from its memory earlier infractions and reprimands for which there was not immediate termination. This position clearly runs contrary to the stance taken by at least one other "just cause" jurisdiction.

The appellant maintains that the Board of Review clearly misapplied existing standards justifying termination and the

withholding of unemployment benefits for the reason of willfull or wanton conduct. In light of this misapplication, the result reached was arbitrary and capricious, immasculating defined terms and legislative intent.

In addition, "just cause" has not been properly defined or applied by the Department of Employment Security. This term was improperly defined in the instant case in terms of the deliberate, willful and wanton conduct.

Finally, the appellant to its prejudice was denied due process when the Department of Employment Security supplied the respondent-employee with a copy of the appellant's brief on appeal to the Board of Review while at the same time failing to provide appellant with a copy of respondent's brief.

#### ARGUMENT

##### POINT I

THE BOARD OF REVIEW COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO CONSIDER THE REPEATED, RECURRING AND NUMEROUS ACTS OF THE EMPLOYEE WHICH WERE SUFFICIENT TO CONSTITUTE WILLFUL AND WANTON CONDUCT ADVERSE TO THE EMPLOYER'S RIGHTFUL INTEREST UNDER THE LANGUAGE OF THIS COURT IN MARTIN V. DEPARTMENT OF EMPLOYMENT SECURITY, 682 P.2d 308 (1984).

The Utah Supreme Court, in the case of Martin v. Department of Employment Security, 682 P.2d 304, 305 (Ut. 1984), stated as follows with regard to repeated acts sufficient to disqualify an employee from receiving unemployment compensation benefits:

We concede that repeated negligence or carelessness by an employee who is totally indifferent or hostile to his employer's interests



might rise to the level of "deliberate, willful or wanton" conduct. (emphasis added)

In the Martin case, this Court cited two decisions which stand for the above-cited proposition. The first was Rieder v. Commonwealth Employment Compensation Board of Review, 15 Pa. Commw. 211, 325 A.2d 347 (1974). In that decision the claimant worked for two years inspecting trousers for defects. On a number of occasions the employee passed trousers with obvious defects. The Pennsylvania court sustained that state's Department of Employment Security and its Board of Review in its conclusion that the claimant was guilty of "willful misconduct". The conclusion was based on the fact that the claimant could not explain her continued oversights, and her supervisor testified that she did not believe that the employee cared.

The second case cited by this Court was Collison v. Commonwealth Employment Compensation Board of Review, 66 Pa. Commw. 416, 444 A.2d 1330 (1982). In that case, despite repeated warnings, the claimant did not try to improve his working behavior. The Pennsylvania court upheld the Review Board's conclusion that the claimant's conduct evidenced a conscious indifference to his employer's interests and his employment duties, and that this was enough to support a finding of "willful misconduct".

In addition to these cases, the appellant has discovered other authorities which support this general proposition. 76 Am Jur

2d, Unemployment Compensation §54, page 948 states in pertinent part as follows:

Work-connected negligence or inefficiency constitutes misconduct within the meaning of an unemployment compensation statute precluding a discharged employee from unemployment compensation benefits when the negligence or inefficiency is of such a degree or recurrence as to manifest culpability, wrongful intent, evil design, or intentional or substantial disregard for that employer's interests or of an employee's duties and obligations. (emphasis added)

See also Drake v. Unemploy. Comp. Bd. of Rev., 470 A.2d 1115 (Pa. Cmwlth. 1984), where willful misconduct was found when a cab driver employee was involved in five accidents in two years. In Appeal of Miller, 453 A.2d 1269 (N.H. 1982), three reprimands were given to the claimant for safety violations. On the fourth incident, which consisted of jumping off a loading dock when he was told not to, he was discharged. The denial of benefits was upheld due to "recurring carelessness or negligent acts sufficient to constitute misconduct".

As previously noted, the employee's misconduct is well-documented in the record. It was repetitive, recurring over a period of approximately two years. Mr. Dailami received two written reprimands, one in 1983 and one in September of 1984, with no improvements noted (Rec. 0146, 0157 - 0164). Yet, in spite of this obvious fact, the Administrative Law Judge and the Board of Review, in words that cause one to wonder if the record was read, described Mr.

Dailami's repeated acts of unacceptable conduct as ordinary negligence in "isolated instances" (Rec. 0009 - 0121).

Appellant maintains that the position of this Court regarding repeated acts of negligence as being sufficient to constitute "deliberate, willful and wanton conduct" should apply here, although many of respondent's acts go beyond mere negligence. If the conduct of this employee in this case is not sufficiently repetitive or recurring to constitute willful and wanton conduct under the criteria set out in Martin v. Department of Employment Security, supra, then one is caused to wonder if such a case exists. Even if the appellant were to concede that all of the respondent's failures to properly perform were due to negligence, they can hardly be termed "isolated." While the incidents did occur one-at-a-time and in this sense they were isolated, the incidents occurred again and again and were so numerous as to cause any person of ordinary intelligence to have reason to believe that if after two years there was no improvement, that it was unlikely there would be any improvement in the future. The fact that each incident happened one after the other and that there may have been a time gap between the happenings should not mean that the incidents were not repeated. Surely, the appellant was not required to blot from its memory each incident after it occurred. To do so would mean that nothing would ever rise to the repetitive standard required to constitute willful or wanton conduct. Furthermore, that appellant had not forgotten is

verified by the reprimands given to respondent referring to prior acts.

Appellant will not replicate here the litany of equipment failures, failure to repair equipment and other incidents of improper work performance and job rule violations by the employee-respondent, but refers the Court to its summary contained in its STATEMENT OF FACTS. Both the ALJ and the Board of Review apparently ignored these numerous incidents, which were presented at the time of the hearing, by summarily dismissing them almost without comment, referring only to the equipment shutdowns.

The appellant maintains that in failing to apply the Martin standard which in dicta stated that repeated acts of negligence or carelessness can constitute deliberate, willful and wanton conduct, the Board of Review entered findings not supported by substantial evidence amounting to reversible arbitrary and capricious action. See Salt Lake City Corporation v. Department of Employment Security, 657 P.2d 1312 (Ut. 1982).

## POINT II

THE DECISION OF THE BOARD OF REVIEW WAS ARBITRARY AND CAPRICIOUS AND AMOUNTED TO AN ABUSE OF DISCRETION IN THAT THE EVIDENCE CLEARLY SHOWED THAT THE EMPLOYEE WAS TERMINATED FOR JUST CAUSE ONLY AFTER REPEATED WARNINGS FOR NUMEROUS ERRORS AND INCIDENTS OF FAILURE TO PROPERLY PERFORM HIS WORK.

Assuming, for purposes of argument only, that the proposed regulations defining "just cause", Section A71-07-1:5(II)-1 of the Rules and Regulations on Discharge, are correct, the employer

clearly met its burden of showing the required elements of culpability, knowledge and control, and there is not substantial evidence to support the findings of the Board of Review, rendering its decision reversible for the reason it is arbitrary and capricious. An analysis of the elements of "just cause" as defined in the proposed rules and regulations shows that the claimant's conduct falls within each one of these elements:

A. Culpability. (§A71-07-1:5(A)(3)(a))

Culpability is defined in part as:

. . . The wrongness of the conduct must be considered in the context of the particular employment and how it effects 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. (emphasis added)

In the instant case, the conduct of the employee was not isolated, but repetitive and persistent. Indeed, some 18 separate and distinct instances of conduct adverse to the interests of the employer are noted in the record. (See STATEMENT OF FACTS.) In addition, some of these incidents potentially involved life-threatening situations to patients at the hospital. The claimant was warned about shutdowns, maintenance failures, and failure to perform duties, yet his performance continued to be deficient in these areas, despite reprimands. Significantly, both the Board of Review and the ALJ characterized respondent's conduct as "isolated

instances," rather than an isolated instance (Rec. 0009, 0121). (See Addendum Exhibits H & I.) "Isolated instances" when added together comprise repeated instances. Furthermore, the precise reason reprimands were given was because there was reason to believe based on experience that they would occur again, which, in fact, proved to be the case.

The Board of Review further obfuscated the issue of culpability by referring to the culpability standard in Clearfield City v. Board of Review, 663 P.2d 440 (Ut. 1983) (Rec. 0009), which was a "willful and wanton" case, not a "just cause" termination case. Culpability, as the rules and regulations require of employees for a just cause termination disqualifying him for unemployment compensation, was clearly shown in the evidence because of the repetitive nature of Mr. Dailami's misconduct.

B. Knowledge. (§A71-07-1:5(A)(3)(b))

Knowledge is defined in pertinent part as follows:

. . . [H]e (the employee) 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 written policy, except in the case of flagrant violation of a universal standard of behavior. . . . 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.

In both September of 1983 and September of 1984, the plaintiff was given warnings regarding unscheduled shutdown of equipment

and failure to perform maintenance. Despite these warnings, the conduct for which he was reprimanded continued, resulting in his termination. Surely, in light of the written reprimands, it cannot be said that Mr. Dailami did not have knowledge of his deficiencies. He signed the 1983 reprimand (Rec. 0146), and there are affidavits of both persons who were present on the occasion of his second reprimand in late 1984, who under oath both say that he received the second reprimand (Rec. 0087 and 0089).

C. Control. (§A71-07-1:5(A)(3)(c))

With regard to control, the Rules and Regulations state:

The conduct must have been within the power and capacity of the claimant to control or prevent.

Significantly, the Board of Review conceded that "the incidents in 1983 may have been within claimant's control" (Rec. 0009). Clearly, the reprimands indicate the situation was within the employee's power to control and prevent.

For reasons not entirely clear, the Rules and Regulations in defining "just cause", Section A71-07-1:5(A)(4), state:

The term "just cause" as used in Section 5(b)(1) 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 Section 5(b)(1) 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 Section 5(b)(1) was apparently to correct this restrictive inter-

pretation. While some fault must be present, it is sufficient that the acts were intended, the consequences were reasonably foreseeable, and that the acts have serious effect on the employee's job or the employer's interests.  
(emphasis added)

The aforementioned Rules and Regulations propose that mere "mistakes, inefficiency, failures 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" are not sufficient to establish knowledge or control. See §A71-07-1:5(A)(5). However, this same section, §A71-07-1:5(A)(5), seems to contradict itself when it states as follows:

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.  
(emphasis added)

The employee in this case was guilty of repeated instances of carelessness and failure to perform as set out in detail in the record. He certainly had knowledge because of the reprimands he received. The absence of control seems to be characteristic of negligence or carelessness and the requirement that the repeated negligence or carelessness be within the control of the employee seems contradictory. Furthermore, in setting a lower standard for "just cause" and abolishing the intentional aspect of it in Section A71-07-1:5(A)(4), imposing a control requirement seems to be



contradictory. Nevertheless, the detailed reprimands and the very nature of the work clearly demonstrate that the conduct was within the employee's ability to prevent, thereby justifying the denial of unemployment security benefits under U.C.A. §35-4-5(b)(1) for a just cause termination. Therefore, although under normal circumstances in the event of an isolated occurrence fault would not be found, in this case the conduct of the employee due to its repetitive nature constituted "just cause" for termination.

The employee by his failure to follow instructions was guilty of a "serious behavior problem" as set out in the Constructive Discipline section of the hospital Employee Relations Policy (Rec. 0153). Furthermore, item (5) on page 7 of the hospital Constructive Discipline Policy (Rec. 0153) states as follows:

(5) inefficiency, incompetence, or negligence in the performance of duties (incompetence related to "patient care" is considered very serious!).

In addition, under the hospital Constructive Discipline Policy, page 8, item (6) (Rec. 0154), we read:

Examples of serious behavior problems or rule violations can include but are not limited to  
. . .

(6) refusal to carry out work instructions. . . .

By failing to complete the following duties the claimant was remiss in executing his job as described in his "position description":

(1) failure to repair steam trap in pharmacy, (2) failure to replace steam valve in engineering shop, (3) failure to investigate improperly maintained pop-off valves on steam system, (4) failure to repair number 1 water circulating pump as requested, (5) failure to properly monitor chemical mixture of water in boiler and steam system.

(See employee's job description consisting of three pages and attached in the Addendum as Exhibit A. This job description was submitted at the time of the hearing and appears in the Record at pages 0141 - 0143.)

Finally, the State of Ohio has a statute which like Utah's disqualifies employees from receiving unemployment benefits for just cause. (See Ohio Revised Code Annotated §4141.29(D)(2)(a) in Addendum Exhibit B.) Courts in Ohio considered some situations very similar to the instant case and held that the employee was terminated for "just cause" and thereby disqualified from receiving unemployment compensation.

Probably the case which is most closely on point is Winters National Bank & Trust Co. v. Board of Review, et al., 9 CCH Unemployment Insurance Reporter, para. 9464, Ohio Court of Common Pleas, Montgomery County, No. 81-3363, 12/29/82. (See Addendum Exhibit C.) In this case it was held that violations, mistakes and poor work attitude can accumulate until the totality constitutes "just cause" justifying discharge and disqualifying the employee for unemployment compensation benefits. Significant is the following language which appears in that one page decision:

It is certain from the transcript that Donna K. Woods knew the rules of the bank and was warned of consequences of future infraction. There were future infractions. Further, there is no legal requirement that an employer somehow block from his memory the infractions for which there was not an immediate termination. From the Referee's decision, it appears that he is of the opinion that unless an employee performs a willful or a wrongful act, the employer must accept sloppy work and continue employing the error-prone person. But just cause for discharging an employee can be and should be the employee's inability to meet the standards and procedures of the employer which are made known to the employee. Violations, mistakes and poor work attitude can accumulate until the totality constitutes "just cause for discharge." (emphasis added)

A similar result was reached in the case of Nurse v. Board of Review and Firestone Tire and Rubber Co., Inc., 9 CCH Unemployment Insurance Reporter, para. 9346, Ohio Court of Appeals, Summit County. No. 9836, 2/18/81, (see Addendum Exhibit D) where for an accumulation of errors an employee was fired for just cause, even though she did not receive notice that future infractions would subject her entire work record for review in consideration of termination. Similarly, in the case of Willie L. Steigle v. Board of Review and Earl M. Jorgensen Co., Allen United Steel Division, et al., 9 CCH Unemployment Insurance Reporter, para. 9449, Ohio Court of Common Pleas, Ohio County, No. A-8009521, 2/9/82, an employee's discharge for just cause was upheld for carelessness and negligent work involving numerous errors by the employee. (See Addendum Exhibit E.)

In Martin v. Bd. of Review, supra, this Court said under certain circumstances it would be willing to deem repeated acts of negligence sufficient to constitute willful and wanton conduct. A similar, but lower, standard should apply to "just cause", and the accumulation of errors and poor quality of work should be disqualifying. The conduct as evidenced in the instant case should constitute termination for just cause requiring the denial of unemployment compensation benefits.

It seems logical to apply the standard from Ohio where conduct does not need to arise to the stature of misconduct and where repeated acts of carelessness or negligence not amounting to willful or wanton conduct are sufficient to constitute just cause.

### POINT III

THE PROPOSED REGULATION OF THE INDUSTRIAL COMMISSION,  
A71-07-1:5(II)-1-DISCHARGE, MISDEFINES "JUST CAUSE."

U.C.A. §35-4-5(b)(1) states as follows with regard to employees' ineligibility for unemployment compensation:

An individual is ineligible for benefits or for purposes of establishing a waiting period:

\* \* \*

(b)(1) For the week in which the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the commission, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.  
(emphasis added)

The proposed rules and regulations defining "just cause" promulgated by the Department of Employment Security contained in Rule A71-07-1:5(A)(3) state in part as follows:

The basic factors which establish fault and are essential for a determination of ineligibility under the definition of just cause are:

a. Culpability. This is the seriousness of the conduct 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 wrongness of the conduct must be considered in the context of the particular employment and how it effects 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.

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 written policy, except in the case of flagrant violations 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.

c. Control. The conduct must have been within the power and capacity of the claimant to control or prevent.

This language was approved by this Court in Kehl v. Board of Review of the Industrial Commission of Utah, Decision No. 20193, filed May 23, 1985.

Appellant maintains the standard set out in the proposed rule is so rigid that it seems doubtful that anything less than "the deliberate, willful or wanton" standard also contained in U.C.A. §35-4-5(b)(1) will suffice to meet it. Indeed, it is hard to imagine how the standards of culpability, knowledge and control can be met without also meeting the willful and wanton standard. Three other jurisdictions, as noted in the Kehl decision, Ohio, Indiana and Delaware, have also adopted "just cause" as disqualifying an employee for unemployment security benefits. [See Addendum Exhibit B, Ohio Revised Code Annotated §4141.29(D)(2)(a); Exhibit F, West's Annotated Indiana Code §22-4-15-1; and Exhibit G, Delaware Code 19 §3315(2).] Furthermore, Indiana and Ohio courts have both held that repeated negligence is sufficient to constitute fault.

In the Indiana case of Wakshlag v. Review Board of Indiana Employment Security, 413 N.E. 2d 1078, 1082 (Ind. App. 1980), we read:

"Fault" or "just cause" as used in the Employment Security Act, means failure or violation, and does not mean something blame-worthy, culpable, or worthy of censure. . . . Determination of just cause is a question of fact. (citation omitted) It is conduct

evincing such willful or wanton disregard of employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or a carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent, evil design, or to show an intentional or substantial disregard of employer's interests, or of employee's duties or obligations to his employer. (emphasis added)

Here, an Indiana appeals court said that "just cause," which it equates with fault, does not mean culpable conduct, yet the Utah Department of Employment Security has made culpability an element. See Rules and Regulations Section A71-07-1:5(A)(3)(a). It is also significant, as previously noted, that one definition of just cause in Indiana is framed in terms of willful or wanton conduct or carelessness or negligence of a recurring nature. This sounds more like the repeated negligence standard of Martin v. Dept. of Employment Security, supra, than just cause.

In the case of Delaware, that state's Supreme Court defined just cause in terms of a willful or wanton conduct. As stated in Starkey v. Unemployment Insurance Appeal Board, 340 A.2d 165, 166 (Del. Supr. Ct. 1975), this language was cited with approval in the Delaware Supreme Court case of Employee Insurance Appeal Board v. Martin, 413 A.2d 1265, 1267 (1981):

Generally, the term "just cause" refers to a willful or wanton act in violation of either the employers' interest, or of the employee's duties, or of the employee's expected standard of conduct. (citations omitted) It is essentially the equivalent of the term "misconduct" found in the Unemployment Compensa-

tion Statutes, and interpreted in the case law of the jurisdictions.

Accordingly, Delaware definitions should not be looked to since "just cause" in that jurisdiction appears to be equated with willful and wanton conduct. Caution needs to be exercised in our own jurisdiction that just cause is not confused with the higher standard of willful and wanton acts and that in Utah "just cause" does not become equated with willful and wanton conduct.

Ohio courts have established a standard for just cause which, while it requires fault, does not confuse willful and wanton conduct or misconduct with the less egregious "just cause". As stated in Sellers v. Board of Review, Ohio Bureau of Employment, 440 N.E.2d 550, 552 (Ohio App. 1981):

. . . There is, of course, not a slide rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinary intelligent person is a justifiable reason for doing or not doing a particular act. . . .

This court had occasion to construe the words "just cause" in relation to a resignation in Payton v. Sun TV (citation omitted). We said there that just cause had no slide rule definition; rather each case must be considered upon its particular merits. Traditionally, just cause in the statutory sense is that which, to an ordinary intelligent person is a justifiable reason for doing or not doing a particular thing. . . .

As also stated in the case of Angelkovski v. Buckeye Potato Chip Company, Inc., 463 N.E. 2d 1280, 1284 (Ohio App. 1983), in construing just cause:



We have previously held that "just cause" is that kind of conduct which an ordinarily intelligent person would regard as a justifiable reason for discharging an employee. (citations omitted) The conduct need not rise to the stature of misconduct, but there must be some fault on the part of the employee.

As previously noted in ARGUMENT, POINT II, a number of Ohio cases have held that an accumulation of errors or continued poor quality work is enough to constitute discharge for just cause. This would seem to say that a standard similar to that of Martin v. Dept. of Employment Security, 682 P.2d 308 (Ut. 1984), for repeated acts of negligence, but something less than willful or wanton conduct, should be sufficient to constitute just cause.

#### Summary

Delaware seems to equate just cause with willful and wanton conduct. Both Indiana and Ohio courts have held that accumulated errors or repeated negligent acts or carelessness are sufficient to constitute just cause and render an employee ineligible for unemployment security benefits. In addition, both Indiana and Ohio seem to reject knowledge and control as elements of just cause, although Indiana equates just cause with willful and wanton conduct.

Ohio has adopted an "ordinary intelligent person" standard as just cause for termination. The appellant urges that this standard also be adopted in this state as grounds for termination for just cause.

The appellant submits that the proposed rules and regulations defining "just cause" are in error and that by applying such

stringent definitions, in the instant case, the Board of Review committed reversible error in affirming the reversal of the denial of unemployment compensation by the Department of Employment Security.

#### POINT IV

THE BOARD OF REVIEW DENIED THE APPELLANT DUE PROCESS WHEN IT FAILED TO MAIL APPELLANT A COPY OF MR. DAILAMI'S BRIEF WHICH APPELLANT DISCOVERED ONLY WHEN IT REVIEWED THE RECORD ON APPEAL.

The Utah Department of Employment Security has no rules and regulations regarding the procedural aspects of filing briefs or written memoranda in matters appealed to the Board of Review. However, in the Record at page 0114, correspondence from this Department reveals that once the transcript of the hearing was supplied, employer was allowed ten days from the date of the letter to submit a written memorandum. As indicated in the Record, page 0082, the respondent Mr. Dailami was provided with a copy of the employer's brief and given ten days from the date of the letter to submit a written response memorandum. However, when Mr. Dailami did submit a rather lengthy letter and attachments within the ten days allowed by the Department of Employment Security (Rec. 0016 - 0081), this response brief was not forwarded to appellant's counsel as appellant's brief had been forwarded to the respondent, Mr. Dailami. This failure was discovered only after appeal was made to the Supreme Court and after the appellant obtained a copy of the record on appeal. Appellant maintains that this was clearly a denial of

procedural due process guaranteed by the Fourteenth Amendment of the United States Constitution as well as Article I, Section 7 of the Constitution of the State of Utah which deprived the respondent of the right of filing a reply brief.

Because the Department of Employment Security has no rules and regulations regarding procedure on appeal to the Board of Review, the Department of Employment Security can hardly be faulted for failure to apply its own rules and regulations. However, the appellant maintains that fundamental rights of due process have been denied.

This Court in Nielsen v. Jacobsen, 669 P.2d 1207, 1213 (Ut. 1983), stated as follows with regard to procedural due process mandated by the Fourteenth Amendment of the United States Constitution and Utah's Constitution, Article I, Section 7:

"Due process" is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances. Rather, "the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved." Rupp v. Grantsville City, Utah, 610 P.2d 338, 341 (1980).

The appellant maintains that it was not accorded procedural due process when the employee was provided with a copy of the employer's brief, but the employer was not provided with a copy of the employee's brief, thereby depriving the appellant of making any sort of comment or filing a reply brief at the administrative level.

Although the appellant realizes that in administrative procedure, the niceties of the technical rules of law are not as strictly supplied, nevertheless, fundamental fairness within the concept of procedural due process should be observed. Indeed, this Court's own rules provide for service of briefs on the opposing parties. (See Rule 26 of the Utah Rules of Appellate Procedure.) While the employee can certainly be excused from understanding this, it does not seem that the Utah Department of Employment Security should escape such criticism; especially, when that body took upon itself to provide the employee a copy of appellant's brief to the Board of Review when the appellant had already certified that he had sent a copy of his brief to the employee, and then denied appellant similar treatment.

As previously noted, the Rules and Regulations of the Department of Employment Security are silent on the issue of serving the opposing party with a copy of that party's brief. Nevertheless, appellant maintains that procedural due process dictates that opposing parties be served with copies of briefs. 5 CJS Appeal and Error, §1336(b), states as follows with regard to the failure of a party to serve the opposing party with a copy of his brief:

The effect of a failure to serve a brief on the adverse party to the appeal, or on his counsel, varies in accordance with the statutory provisions and rules of the court in the particular jurisdiction, and the effect of such a failure also depends, to some extent, at least, on the facts and circumstances of the case. Thus, a failure properly to serve

the brief may cause the appellate court to refuse to consider the brief; counsel may be subjected to a penalty, although it may not be grounds for dismissal; it may be grounds for dismissal, in the discretion of the court, . . . (emphasis added)

It is not for the appellant to dictate what penalty should be assessed for the Department of Employment Security's failure to provide appellant with a copy of the brief of the employee at the administrative level. It should probably not be a dismissal of the appeal at the administrative level. However, inasmuch as the Department of Employment Security generally represents the employee's interests before the Board of Review, for failure to provide appellant's counsel a copy of the employee's brief at the administrative level the penalty, at the very least, should be that those materials submitted by the employee should not be considered as part of the record on appeal. In any event, the appellant has clearly been denied procedural due process at the administrative level and deprived of the opportunity to submit a reply brief.

#### CONCLUSION

Based on the foregoing, appellant maintains that both the Board of Review and the Administrative Law Judge erred in granting the employee the benefit of unemployment security payments. In addition, just cause has been misdefined by the Department of Employment Security. Finally, this appellant was denied procedural due process at the administrative level. The appellant, Logan Regional Hospital, therefore requests that this Court reverse the

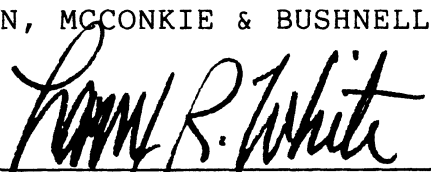
decision of the Board of Review and enter an order denying unemployment compensation benefits to the employee, Abdul H. Dailami.

Dated this 24<sup>th</sup> day of September, 1985.

Respectfully submitted,

KIRTON, MCCONKIE & BUSHNELL

By

  
\_\_\_\_\_  
Larry R. White  
Attorneys for Appellant

ADDENDUM

Item

Logan Regional Hospital Boiler Operator Job  
Description.....Exhibit A

Page's Ohio Revised Code Annotated, §4141.29.....Exhibit B

Winters National Bank & Trust Co. v. Bd. of Rev.,  
et al. 9 CCH Unemployment Security Reporter,  
para 9464, Ohio Court of Common Pleas, Montgomery  
County No. 81-3363, 12/29/82.....Exhibit C

Nurse v. Board of Review and Firestone Tire & Rubber  
Co., Inc., 9 CCH Unemployment Security Reporter,  
para. 9346, Ohio Court of Appeals, Summit County,  
No. 9836, 2/18/81.....Exhibit D

Willie L. Steagall v. Bd. of Rev. and Earle M.  
Jorgensen Co., Allan United Steel Division, et al.,  
9 CCH Unemployment Security Reporter, para. 9449,  
Ohio Court of Common Pleas, Hamilton County No.  
A-8009521, 2/9/82.....Exhibit E

West's Annotated Indiana Code, §22-4-15-1.....Exhibit F

Decision of Administrative Law Judge, March 26, 1985.....Exhibit G

Decision of Board of Review, June 18, 1985.....Exhibit H

POSITION DESCRIPTION (NON-EXEMPT)

ION TITLE: Boiler Operator

DATE: March, 1983

OF INCUMBENTS:

WRITTEN BY: Cathy Laveroni

SUPERVISOR'S TITLE: Manager of Plant Operations

APPROVED BY:

ORGANIZATIONAL UNIT: Plant Operations

CODE:

PAY GRADE:

## C FUNCTION

For general supervision, the boiler operator is accountable for performing corrective preventive maintenance of all boilers and boiler related equipment and other building port equipment located in the mechanical area.

## IRE AND SCOPE

## Knowledge

incumbent must be experienced in the appropriate operation of 350 HP or larger boilers. Licensed boiler operator is preferred. The incumbent must demonstrate knowledge of low and high pressure steam boilers, and understanding of boiler de-aerators, chemical feed systems, maintaining appropriate fluid levels. Must be familiar with the operation of large chillers, compressors, vacuum pumps, and large three phase motor pumping systems. The incumbent must have knowledge and experience of water coolers, serpentine maintenance, and steam traps repair and maintenance, and in pumping systems, water thermodynamic cycles, flow and air cleanliness.

## Personal Skills

incumbent deals frequently on a face-to-face basis with hospital employees, department  
agers, and employees within the immediate work group and must therefore possess quality  
erpersonal relationship skills.

Equipment Operated

incumbent operates manual and electrical equipment related to boiler maintenance, including wrenches, pipe threaders, fittings, and pumps. The incumbent also operates manual and electrical tools related to preventive maintenance or repair of the physical plant, including Sanders, grinders, voltage meters, spray guns, etc.

## Ranking Requirements/Decision Making

Incumbent is responsible for conducting routine tests on the boiler equipment and determining that it is operating safely and efficiently. When problems in systems operation



occur, the incumbent is responsible for determining the cause of breakdown and restoring the system to proper operation. The incumbent attends department meetings where the department manager provides safety instructions, discusses hospital procedures, and any other necessary items. The department manager is available for assistance when necessary. When additional equipment or more time is required to complete an approved job, the incumbent obtains approval from the department manager.

#### Results of Work:

All preventive and corrective maintenance to boilers and boiler related equipment, including steam sterilizers, water pumps, cooling towers, and hot water tanks must be completed in an efficient and timely manner to the satisfaction of the department manager and to meet safety codes and insurance regulations. The incumbent must be aware of the hazards of working with electrical equipment, hot water and steam. Implications of error include damage to the building or equipment and injury to the employee.

#### PRINCIPAL ACCOUNTABILITIES

1. Responsible for the safe and appropriate operation of glycol systems, penthouse heating and cooling systems, and penthouse air handling systems.
2. Performs routine checks on steam gauges, fuel levels, and other liquid levels.
3. Maintains and repairs steam traps, de-airation equipment, vacuum pumps, compressors, and other special equipment.
4. Responsible for the safe and appropriate operation of hospital dual 350 HP boilers.
5. Performs preventive maintenance on all equipment in assigned areas.
6. Responsible for the appropriate operation of water softeners and water heaters.
7. Trouble shoots the boiler system, including filling the boiler, getting up steam, and maintaining the water level.
8. Analyzes problems in boiler operation and restores operation when common problems occur.
9. Performs all routine tests to boiler and other hot water and steam systems, including assuring proper chemical balance in feed pumps, routine documentation of boiler operating pressure, and routine temperature checks on hot water to the building.
10. Performs inspections to the boiler and related components as required by law or insurance carriers and maintains appropriate documentation of such.
11. Maintains cleanliness of work areas and performs repairs on required or assigned equipment.
12. Responsible for maintenance and repair of deionized system.

13. Responsible for maintenance and operation of the honeywell compressors.
14. Maintains and operates the incinerator.

Working Conditions:

The incumbent works in a clean working environment except when working above the ceiling or working with a serious steam or hot water leak. The incumbent frequently lifts up to 100 pounds. Possible dangers on the job include electrical shock and injury from hot water or steam. The incumbent is exposed to constant medium level noise from the boilers and equipment in the mechanical area. The incumbent must work safely with caustic chemicals.

grant a writ of mandamus requiring the board of review to schedule a hearing on the question of whether the claimant is entitled to unemployment compensation benefits: *State ex rel. Cox v. Lopeman*, 13 OApp3d 192, 130 OBR 239, 468 NE2d 781.

25. (1984) The common pleas court, in an appeal from an administrative agency, must give due deference to the agency's resolution of evidentiary conflicts and the court may not substitute its judgment for that of the agency. If, at the agency level, a preponderance of reliable, probative and substantial evidence exists, the common pleas court must affirm the agency's decision: *Budd Co. v. Mercer*, 14 OApp3d 269, 14 OBR 298, 471 NE2d 151.

26. (1984) Under RC § 4141.28(O), it is proper for the trial court to dismiss the appeal of an unemployment compensation claimant who failed to provide a copy of the notice of appeal to the board of review, where, due to this failure, the board was unable to provide the court with a transcript of the record: *Palic v. Garland Floor Co.*, 14 OApp3d 297, 14 OBR 354, 471 NE2d 164.

27. (1984) A court of common pleas may not substitute its judgment for that of the unemployment compensation board of review on factual issues, and may modify the board's decision and enter final judgment only where the facts are not in dispute and such undisputed facts are determinative of the issues. Where, however, the referee has no conflicting testimony and evidence, the referee's decision may be reversed if no substantial evidence supports it: *Wilson v. Bd. of Review*, 14 OApp3d 309, 14 OBR 374, 471 NE2d 168.

28. (1984) In dealing with a claim that the judgment is against the manifest weight of the evidence, a reviewing court can reverse only if the verdict is so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice: *Sambunjak v. Bd. of Review*, 14 OApp3d 432, 14 OBR 550, 471 NE2d 835.

### § 4141.29 Eligibility and qualification for benefits.

Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46 of the Revised Code.

(A) No individual is entitled to a waiting period or benefits for any week unless he:

(1) Has filed a valid application for determination of benefit rights in accordance with section 4141.28 of the Revised Code;

(2) Has made a claim for benefits in accordance with section 4141.28 of the Revised Code;

(3) Has registered at an employment office or other registration place maintained or designated by the administrator of the bureau of employment services. Registration shall be made in person or in writing in accordance with the time limits, frequency, and manner prescribed by the administrator.

(4)(a) Is able to work and available for suitable work and is actively seeking suitable work either in a locality in which he has earned wages subject to Chapter 4141. of the Revised Code, during his base period, or if he leaves such locality, then in a locality

where suitable work is normally performed.

The administrator may waive the requirement that a claimant be actively seeking work when he finds that an individual has been laid off and the employer who laid him off has notified the administrator within ten days after the layoff, that work is expected to be available for the individual within a specified number of days not to exceed forty-five calendar days following the last day the individual worked. In the event the individual is not recalled within the specified period, such waiver shall cease to be operative with respect to such layoff.

(b) The individual shall be instructed as to the efforts that he must make in his search for suitable work, except where the active search for work requirement has been waived under division (A)(4)(a) of this section, and shall keep a record of where and when he has sought work in complying with such instructions and shall, upon request, produce such record for examination by the administrator.

(c) An individual who is attending a training course, approved by the Ohio worker training committee or the administrator, meets the requirement of this division, if such attendance was recommended by the administrator and the individual is regularly attending the course, and is making satisfactory progress. An individual also meets the requirements of this division if he is participating and advancing in a training program, as defined in division (P) of section 5709.61 of the Revised Code, and if an enterprise defined in division (B) of section 5709.61 of the Revised Code is paying all or part of the cost of the individual's participation in the training program with the intention of hiring the individual for employment as a new employee as defined in division (L) of section 5709.61 of the Revised Code for at least ninety days after the individual's completion of the training program.

(d) An individual who becomes unemployed while attending a regularly established school and whose base period credit weeks were earned in whole or in part while attending such school, meets the availability and active search for work requirements of division (A)(4)(a) of this section if he makes himself available on any shift of hours for suitable employment with his most recent employer or any other employer in his base period, or for any other suitable employment to which he is directed, under Chapter 4141. of the Revised Code.

(e) The administrator shall adopt such rules as he deems necessary for the administration of division (A)(4) of this section.

(f) Notwithstanding any other provisions of this section, no otherwise eligible individual shall be denied benefits for any week because he or she is in training approved under section 236 (a)(1) of the "Trade Act of 1974," 88 Stat. 1978, 19 U.S.C. 2296, nor shall such individual be denied benefits by

reason of leaving work to enter such training, provided the work left is not suitable employment, or because of the application to any week in training of provisions in Chapter 4141. of the Revised Code, or any applicable federal unemployment compensation law, relating to availability for work, active search for work, or refusal to accept work.

For the purposes of division (A)(4)(f) of this section, "suitable employment" means with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment, as defined for the purposes of the "Trade Act of 1974," 88 Stat. 1978, 19 U.S.C. 2101, and wages for such work at not less than eighty per cent of the individual's average weekly wage as determined for the purposes of that federal act.

(5) Is unable to obtain suitable work.

(B) An individual suffering total or partial unemployment is eligible for benefits for unemployment occurring subsequent to a waiting period of one week and no benefits shall be payable during this required waiting period, but no more than one week of waiting period shall be required of any such individual in any benefit year in order to establish his eligibility for total or partial unemployment benefits except that, notwithstanding any other provisions of Chapter 4141. of the Revised Code, when an individual qualifies within his benefit year for three consecutive compensable weeks of total unemployment occurring any time after the required waiting period, he shall be paid benefits for his waiting period claim in accordance with the terms of Chapter 4141. of the Revised Code, except that an individual who first files an application for benefits during calendar years 1983, 1984, and 1985 shall not be paid benefits for his waiting week after he qualifies within his benefit year for three consecutive compensable weeks of total unemployment.

(C) The waiting period for total or partial unemployment shall commence on the first day of the first week with respect to which the individual first files a claim for benefits at an employment office or other place of registration maintained or designated by the administrator or on the first day of the first week with respect to which he has otherwise filed a claim for benefits in accordance with the rules and regulations of the bureau of employment services, provided such claim is allowed by the administrator or his deputy.

~~(D) Notwithstanding division (A) of this section, no individual may receive a waiting period or be paid benefits under the following conditions:~~

~~(1) For any week with respect to which the administrator finds that:~~

~~(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which~~

he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if:

(i) His employment was with such employer at any factory, establishment, or premises located in this state, owned or operated by such employer, other than the factory, establishment, or premises at which the labor dispute exists, if it is shown that he is not financing, participating in, or directly interested in such labor dispute; or

(ii) His employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged in the dispute, or unless he actively participates in or voluntarily stops work because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

(b) He has been given a disciplinary layoff for misconduct in connection with his work.

~~(2) For the duration of his unemployment if the administrator finds that:~~

~~(a) He quit his work without just cause or has been discharged for just cause in connection with his work, provided division (D)(2) of this section does not apply to the separation of a person under any of the following circumstances:~~

(i) Separation from employment for the purpose of entering the armed forces of the United States if he makes application to enter, or is inducted into such armed forces within thirty days after such separation;

(ii) Separation from employment pursuant to a labor-management contract or agreement, or pursuant to an established employer plan, program, or policy, which permits the employee, because of lack of work, to accept a separation from employment;

(iii) He has left his employment to accept a recall from a prior employer or to accept other employment as provided under section 4141.291 [4141.-29.1] of the Revised Code, or has left employment which is or was concurrent employment where the remuneration, hours, or other conditions of such employment are substantially less favorable than his other work which was performed during such concurrent employment and where such employment, if offered as new work, would be considered not suitable under the provisions of divisions (E) and (F) of this section. Any benefits which would otherwise be chargeable to the account of the employer from whom an individual has left employment under conditions described in division (D)(2)(a)(iii) of this

of the judgment of the common pleas court upon its jurisdiction. Thus, the issue raised by appellee's motion is the issue presented by the merits of the appeal. A motion to dismiss could be sustained under such circumstances only if it be determined that the appeal has no arguable merit.

In this case, however, not only does the motion to dismiss raise an issue that can be determined only by a review of the record on appeal, but appellant raises an issue independent of the jurisdictional issue raised by appellee by contending to the effect that its complaint states a claim for relief in declaratory judgment.

While this court is bound by the decisions of the Supreme Court, which would be applicable if the record on appeal reveals the facts to be as claimed by appellee, this is one of the main issues raised by the

merits of the appeal itself. A motion to dismiss is not the proper method for an appellee to contest the merits of an appeal, at least unless it be a frivolous appeal.

Here, however, the appellee has apparently confused the jurisdictional requisites for the common pleas court with those for this court, which are established by R. C. 2501.02, 2505.02, 2505.03 and 4141.26(B) and Section 3(B)(2), Article IV, Ohio Constitution. R. C. 4141.26(B) specifically provides that the judgment of the common pleas court may be appealed "as in ordinary civil cases."

Accordingly, the motion to dismiss is overruled.

Motion overruled.

REILLY and McCORMAC, JJ., concur.

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[¶ 9464] **Winters National Bank & Trust Co. v. Bd. of Rev., et al.** Ohio Court of Common Pleas, Montgomery County. No. 81-3363, 12/29/82.

**Discharge for misconduct—Manner of performing work—Accumulation of errors.—**

Just cause for discharging an employee can be the employee's inability to meet the standards and procedures of the employer which are made known to the employee, and violations, mistakes and poor work attitude can accumulate until the totality constitutes "just cause for discharge." Accordingly, where a bank employee knew the rules of the bank and was warned of the consequences of future infractions, but where future infractions occurred, this was just cause for her discharge. See Ohio ¶ 1970.52.

MACMILLAN, JR., J.: The Appellant-Employer filed its Notice of Appeal from the decision of the Board of Review which disallowed the application to institute a further appeal. The decision of the Referee, Joseph F. Weinle, dated September 23, 1981, is the subject of the Appellant's appeal.

The Court, having reviewed the proceedings and the transcript of the testimony before the Referee, finds that the Referee's decision is unreasonable and against the manifest weight of the evidence.

It is certain from the transcript (Pages 23-28) that Donna K. Woods knew the rules of the bank and was warned of consequences of future infraction. There were future infractions. Further, there is no legal requirement that an employer somehow blot from its memory the infractions for which there was not an immediate termination. From the Referee's decision, it appears that he is of the opinion that unless an employee performs a willful or a wrongful act, the employer must accept sloppy work and continue employing the

error-prone person. But just cause for discharging an employee can be and should be the employee's inability to meet the standards and procedures of the employer which are made known to the employee. Violations, mistakes and poor work attitude can accumulate until the totality constitutes "just cause for discharge." In this case, the conduct of Donna K. Woods required termination of her employment because the essence of confidence in banks is dependent upon the exactness, the trustworthiness, and the attitude of the employee meeting the public.

The Administrator's decision was a reasonable one, not the Referee's decision.

The Court finds the Referee's decision is unreasonable and against the manifest weight of the evidence, that his decision be overruled, and the decision of the Administrator be **AFFIRMED**.

This Order is intended as a final order from which an appeal may be taken.

Copies of the above are hereby sent to all parties listed below by ordinary mail on this date of filing.

4141.28(O) and R. C. 4141.01(I), in the case at bar, we find that the lower court erred in holding that it had subject matter jurisdiction to hear Nurse's appeal.

#### Summary

We accordingly hold that the trial court properly affirmed the Board of Review's

decision and we overruled both of appellants assignments of error. Additionally, upon the cross-assignment of error we conclude the trial court was without jurisdiction to hear the appeal from the Board's decision. We, therefore, affirm the decision of the court of common pleas.

[¶ 9347] *Herman W. Jones v. Glavic Motors, Inc., et al.* Ohio Court of Appeals, Lake County. No. 8-049, 3/2/81. Before DAHLING, P. J., HOFSTETTER, J. and COOK, J.

**Claims and appeals procedure—Taking and perfecting proceedings for review—Notice—Filing, sufficiency.**—As the court was without jurisdiction to hear an appeal because the appellant failed to serve the Administrator, the court was without authority to grant leave to amend the appeal after the thirty-day time limit for appeal had expired. See Ohio ¶ 2020.72.

**Claims and appeals procedure—Jurisdiction and powers of tribunal.**—When the trial court is without jurisdiction to hear an appeal on its merits, it has no legal alternative other than dismissal. See Ohio ¶ 2020.40.

Eugene M. Adelman, 28833 Euclid Ave., Wickliffe, Ohio 44092, for plaintiff-appellant. Ronald Zele, 26111 Brush Ave., Euclid, Ohio 44132, and Q. Albert Corsi, Asst. Atty. Gen., 810 The Lausche Bldg., 615 W. Superior Ave., Cleveland, Ohio 44113, for appellees.

#### Opinion

HOFSTETTER, P. J.: The Board of Review of the Ohio Board of Employment services determined that the appellant quit his employment without just cause.

Appellant then filed a timely notice of appeal to the Common Pleas Court, but failed to serve notice on the Administrator of the Bureau of Employment Services.

An amended notice of appeal, with leave of court, was served on the Administrator after the thirty-day time limit had expired. The Attorney General filed a motion to dismiss the appeal, which was granted by the Common Pleas Court. The appellant has appealed that dismissal, assigning three errors, as follows:

1. Based on the express statutory language of Ohio Revised Code 4141.28(O) and the facts of this case, it was error for the court below to find that failure to join the Administrator of the Ohio Bureau of Employment Services as a party-appellee was a jurisdictional defect.

2. Since the court allowed the administrator to be joined as a party pursuant to leave of court having been granted, it was error for the court to dismiss the appeal since joinder of the administrator did not rise to the level of a jurisdictional defect but was procedural only.

3. Based on the liberal construction afforded to party appellants pursuant to

the Ohio Revised Code section 4141.46 and remedial laws in general, it was error for the court below to dismiss the within appeal without hearing the case on its merits.

This court has addressed the issue raised herein at least twice during the past eighteen months, as noted in the appellees' briefs. We held that failure to serve the Administrator or any other interested party to such appeal is a failure to perfect the appeal, and the Common Pleas Court acquires no jurisdiction of said appeal. Our thinking in that regard has been confirmed by the Supreme Court in *In re Claim of King* (1980), 62 Ohio St. 2d 87. That court, in a unanimous per curiam opinion, said in part:

In order to perfect an appeal under R. C. 4141.28(O), the statute explicitly requires that the party appealing serve all other interested parties with notice. Appellee herein failed to follow this directive when he failed to serve notice on appellant. Therefore, this court finds that the Court of Common Pleas lacked subject-matter jurisdiction in this matter.

\* \* \*

Appellee's reliance on our decision in *Joy Mfg. Co. v. Albaugh* (1953), 159 Ohio St. 460, is misplaced. In that case we interpreted the predecessor statute to the current R. C. 4141.28(O). The earlier statute did not so clearly mandate that the administrator of the Bureau of Employment Services be served with notice, as does the present statute.

(Tr. 28) Q. And you're saying you spilled about 300 gallons?

A. Approximately.

Q. Did you report this to anyone?

A. I didn't get to talk to the dispatcher that morning, but I told him that evening when I come in.

Q. And that was when he fired you though, right?

A. Right.

The decision of the referee found that Claimant was discharged for just cause in connection with work, and that the disqualification for benefits was properly imposed by the administrator, which decision of the administrator, upon being reconsidered by the referee, was affirmed.

Application to institute further appeal was disallowed by the Board of Review,

Ohio Bureau of Unemployment Services. The Common Pleas Court rendered judgment finding the decision of the Board of Review not to be unlawful, unreasonable, or against the manifest weight of the evidence.

On appeal to this Court, Claimant-Appellant has not set forth any separately specified Assignments of Error in compliance with Rule 16(A)(2), Ohio Rules of Appellate Procedure.

We do not find the judgment of the Common Pleas Court appealed from to be either against the manifest weight of the evidence or contrary to law, and no error prejudicial to Appellant appearing, the judgment appealed from is affirmed.

Judgment affirmed.

[¶ 9346] *Stephanie E. Nurse v. Bd. of Rev. and Firestone Tire & Rubber Company, Inc.* Ohio Court of Appeals, Summit County. No. 9836, 2/18/81.

**Discharge for misconduct—Manner of performing work—Accumulation of errors.**—A claimant was discharged for just cause where she was discharged due to sleeping on the job, tardiness, absenteeism, fighting, negligence and "poor work," notwithstanding her contention that it was error as a matter of law to find just cause where she did not receive notice that future infractions would subject her entire work record to review for consideration of termination. See Ohio ¶ 1970.52.

**Claims and appeals procedure—Taking and perfecting proceedings for review—Notice—Filing, sufficiency.**—The court did not have subject matter jurisdiction to hear an appeal where the appellant failed to name the Administrator as an appellee in the suit and to serve him with a copy of the notice of appeal. See Ohio ¶ 2020.72.

**Claims and appeals procedure—Jurisdiction and powers of tribunal.**—The issue of subject matter jurisdiction may be raised at any stage of the lower court proceeding or the appeal. See Ohio ¶ 2020.40.

#### Decision and Journal Entry

This cause was heard January 7, 1981, upon the record in the trial court, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, J.: The lower court denied the attorney general's and Firestone Tire and Rubber Company's, defendants-appellees, motion to dismiss for lack of subject matter jurisdiction, but affirmed the Board of Review of Employment Services' decision that Stephanie Nurse, plaintiff-appellant, was discharged for just cause. We affirm the decision of the lower court, and also hold that the lower court erred in finding that it had subject matter jurisdiction.

#### Facts

The Board of Review of Employment Services held on November 6, 1979, that

Stephanie Nurse was not entitled to unemployment compensation benefits because Firestone Tire and Rubber Company (hereafter Firestone) discharged her for just cause. Nurse appealed the Board's decision to the court of common pleas.

In Nurse's notice of appeal filed with the lower court, Nurse failed to name the administrator of the Ohio Bureau of Employment Services as a party to the suit, nor did Nurse serve a copy of the notice of appeal upon the administrator. Nurse's amended notice of appeal was also delinquent in the above mentioned respects.

The attorney general moved to dismiss the case on the grounds that the common pleas court lacked subject matter jurisdiction to hear the appeal since the administrator had not been named an appellee to the suit and because no copy of the notice of appeal had been served upon the administrator. The court denied the attorney

general's motion, and, on January 22, 1980, the court granted Nurse's motion to make the administrator a party.

The common pleas court affirmed the decision of the Board of Review that Nurse had been discharged for just cause. Nurse appealed the lower court's affirmance of the Board's decision. Through a cross assignment of error, the attorney general and Firestone appealed the lower court's holding that it had subject matter jurisdiction. Neither the attorney general nor Firestone filed a notice of appeal with this court.

#### Assignments of Error

1. It was error for the court to affirm the decision of the Board of Review since there was no substantial, reliable and probative evidence to show that appellant acted in willful disregard of her employer's best interest.

2. It was error, as a matter of law, for the court to find that the discharge was for just cause since, under the circumstances of this case, appellant was entitled to notice that any future infractions would subject her entire work record to review for consideration on whether to terminate her.

Our review of this appeal is very narrow and limited solely to determine if the common pleas court acted properly in affirming the Board of Review's decision. We concur in its finding that the Board of Review's decision was lawful, reasonable and clearly supported by virtually all of the evidence. Its decision was completely supported by substantial, probative and reliable evidence. Appellant's argument that she was entitled to a warning that future infractions would result in a review of her whole record and possibly invoke discharge are specious at best. Even under the appellant's definitions of "just cause," we fail to see where "sleeping on the job, tardiness, absenteeism, fighting, negligence, and just plain 'poor work,'" are in the employer's best interest or working to the best of one's ability.

#### Preliminary Discussion of the Cross Assignment of Error

Nurse argues that:

This court is without jurisdiction to consider the issue raised in appellant's cross assignment of error since the appellee failed to file a proper, timely notice of appeal.

R. C. 2505.22 provides:

Assignments of error may be filed on behalf of an appellee which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part. The time within which assignments of error on behalf of an appellee may be filed shall be fixed by rule of court.

ment or order is reversed in whole or in part. The time within which assignments of error on behalf of an appellee may be filed shall be fixed by rule of court.

In *Parton v. Weilnau*, 169 Ohio St. 145, 171 (1959), the Supreme Court, in construing R. C. 2505.22, held:

\* \* \* that an assignment of error by an appellee, where such appellee has not filed any notice of appeal from the judgment of the lower court, may be used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify that judgment.

\* \* \*

Since the attorney general and Firestone, in the present case, seek to have the lower court's judgment affirmed rather than modified or destroyed, this court will consider the attorney general's and Firestone's cross assignment of error.

Additionally appellee argues that subject matter jurisdiction may be raised at any stage of the lower court proceeding or the appeal. We agree. Our Supreme Court in *Jenkins v. Keller*, 6 Ohio St. 2d 122 (1966) held that

Where a court has no jurisdiction over the subject matter of an action or an appeal, a challenge to jurisdiction on such ground may effectively be made for the first time on appeal in a reviewing court.

We do not determine for purposes of this appeal whether an actual notice of appeal or cross-appeal was required by the appellees.

#### Appellee's Cross Assignment of Error

The common pleas court erred in overruling the motions to dismiss submitted by the office of the attorney general and by the employer.

The Supreme Court and this court in numerous decisions have held that R. C. 4141.28(O) and R. C. 4141.01(i) require an appellant in an appeal of a decision of the Board of Review to name the administration as an appellee in the suit and to serve him with a copy of the notice of appeal. *In re Claim of King*, 62 Ohio St. 2d 87 (1980); *Sullivan v. Kaiser Engineers*, 62 Ohio St. 2d 304 (1980); *U. S. Steel v. Board of Review*, Lorain No. 2967 (9th Dist. Ct. App., May 14, 1980); *Joseph Bagdonas v. Board of Review*, Summit No. 9648 (9th Dist. Ct. App., May 28, 1980). *In re Claim of: Vanessa T. Woolfork*, Lorain No. 2996 (9th Dist. Ct. App., September 3, 1980).

Because Nurse did not comply with the abovementioned requirements of R. C.



capacity beyond March 1, 1980, until subsequent to the date of her delivery in May, 1980. As claimant was not physically able to work during the week ending March 29, 1980, the claim for said week must be disallowed.

Ample evidence exists in the record to support the finding that claimant made no attempt to talk to someone in personnel concerning work for her other than as a flight attendant after December 2, 1979, and the fact that claimant never attempted to have her name removed from the medical sick list nor to terminate the medical leave of absence despite a second physician's

more favorable report. Therefore, claimant did not sustain her burden of proof as to entitlement to benefits. This Court will not disturb the administrative agency's fact and credibility determinations.

Therefore, it is ordered that the decision of the Board of Review to disallow any further appeal is affirmed. The decision of the Referee denying unemployment benefits to appellant was lawful, reasonable and supported by the manifest weight of the evidence pursuant to O. R. C. Section 4141.28(O).

Appellant is to pay the costs of this appeal.

[¶ 9449] **Willie L. Steagall v. Bd. of Rev. and Earle M. Jorgensen Co., Allan United Steel Division, et al.** Ohio Court of Common Pleas, Hamilton County. No. A-8009521, 2/9/82.

**Discharge for misconduct—Manner of performing work—Quality of work.**—A claimant was discharged for just cause where, in a two-year period, a total of 30 invoices on which he had worked involved errors and required adjustments, where he had 13 counselling sessions with his employer, where he received a three-day disciplinary layoff after which he committed errors on three more occasions, and where the claimant admitted a number of errors in his work, including one mistake that cost his employer \$1,100. See Ohio ¶ 1970.55.

**Claims and appeals procedure—Cross-examination.**—Although the claimant was not permitted to cross-examine his employer's witness, the hearing on his claim for benefits was fair where the Referee did not formally invite cross-examination by the unrepresented claimant, but where the Referee did question the employer's representative at the urging of the claimant, and where, at the conclusion of the hearing, the claimant acknowledged the hearing had "covered everything." See Ohio ¶ 2020.

**Claims and appeals procedure—Evidence—Hearsay.**—Although the claimant argued that he had not received a fair hearing because the Referee had based his decision substantially on evidence that was hearsay on hearsay, the Referee may admit and accept hearsay, and the employer's representative who testified had personal knowledge of the events leading to discharge. The exhibits were prepared by the employer's representative and the claimant acknowledged their authenticity, and another exhibit contained business records, which are an exception to the hearsay rule. See Ohio ¶ 2020.23.

Simon, Anninos & Namanworth Co., L. P. A., Eli Namanworth, 408 Gwynne Bldg., 602 Main St., Cincinnati, Ohio 45202, for plaintiff-appellant. Taft, Stettinius & Hollister, Lawrence C. Mackowiak, First National Bank Center, Fountain Square, Cincinnati, Ohio 45202, for defendant-appellee, Earle M. Jorgensen Co. Richard H. Lippert, Asst. Atty. Gen., OBES, 1812 Central Parkway, Cincinnati, Ohio 45214.

GORMAN, J.: Plaintiff-Appellant, Willie L. Steagall, has appealed from the decision of the referee and the Board of Review, Ohio Bureau of Employment Services denying his claim for unemployment compensation benefits. His appeal presents the following issues: (1) did plaintiff receive a fair hearing, and (2) was the decision against the manifest weight of the evidence? It was submitted upon the certified record and the memoranda of counsel.

Between March 6, 1978 and June 30, 1980 plaintiff was employed as a "burner" by

defendant-appellee, Earle M. Jorgensen Co. (Jorgensen). His duties were to cut steel according to customer specifications. In 1978 eight invoices and in 1979 twenty-two invoices upon which he worked involved errors and required adjustments. He had thirteen counselling sessions with his employer agreeing each time to improve his performance. On May 23, 1980 he received a three day disciplinary layoff because of cutting errors. When he returned, he committed errors on three more occasions. On June 30, 1980 Jorgensen discharged plaintiff for careless and negligent work.

Ohio ¶ 9449

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Plaintiff argues he did not receive a fair hearing because he was not permitted to cross-examine defendant's witness and because the referee based his decision substantially on evidence that was hearsay on hearsay. Under R. C. § 4141.28(J) the referee in conducting the hearing is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but he is to conduct the hearing in such a way as to ascertain the facts and to determine if a claimant is entitled to benefits. The right to confront and to cross-examine are fundamental to a fair hearing. After Sims, the employer's witness, testified, the referee did not formally invite cross-examination by plaintiff who was unrepresented by counsel. However, the record conclusively reveals the referee thoroughly questioned Sims at plaintiff's urging (Tr. 27-30, 32-33, 35-40), and in fact, when plaintiff was testifying did cross examine on plaintiff's behalf as illustrated by the following example (Tr. 32):

Mr. Steagall: Ask him—ask him how much did they burn.

Referee: Well, how much did they burn, Mr. Sims?

Mr. Sims: May I preference this a little bit? etc.

Furthermore, at the conclusion of the hearing plaintiff acknowledged the hearing "covered everything," (Tr. 40).

Plaintiff also argues he was denied a fair hearing because the employer's evidence was totally hearsay on hearsay. The referee may admit and accept hearsay. *Simon v. Lake Geauga Printing Co.* (1982) 69 Ohio St. 2d 41. This case does not present the

unfair situation where the testimony of the employer's witness who is unacquainted with the facts, is accepted as more credible than the claimant's testimony. *Gipson v. Board of Review*, 8 CCH UNEMPLOYMENT INSURANCE REPORTS, Ohio ¶ 9356 (C. P. Hamilton Co. 1973). In this case not only did the witness, Sims, have personal knowledge, repeated counselling for his alleged substandard performance did occur. In addition, the employer's Exhibits 1 and 2 were prepared by Sims and plaintiff acknowledged they were authentic (Tr. 18). Exhibit 2 appears to contain, what if qualified, were business records, an exception to the hearsay rule under Evid. R. 803(6), and Exhibit 1 is nothing more than a documented narrative prepared by the witness. No prejudicial or unfair advantage was gained by the employer in their admission.

Although conflicting evidence appears in the record, plaintiff admits a number of errors in his work including one mistake that cost Jorgensen \$1,100 (Tr. 26). Plaintiff maintains Jorgensen terminated him because of reduced work. However, there is substantial evidence in the record in which the referee could conclude plaintiff was discharged for just cause and his decision and the decision of the Board of Review are not unlawful, unreasonable or against the manifest weight of the evidence as set forth in R. C. § 4141.28(O) and under the authority of *DeCaro v. Bd. of Rev.*, 8 CCH UNEMPLOYMENT INSURANCE REPORTS, Ohio ¶ 9356 (App. Cuyahoga 1981). Judgment affirmed.

Counsel will present an endorsed entry reflecting the Court's decision by no later than February 20, 1982.

[¶ 9450] *Willie L. Steagall v. Bd. of Rev., Earle M. Jorgensen Co., and Allan United Steel Division*. Ohio Court of Appeals, First District, Hamilton County. No. C-820236, 12/29/82. Before KEEFE, P. J., and BLACK and DOAN, JJ.

**Discharge for misconduct—Manner of performing work—Quality of work.**—A claimant was discharged for just cause where he was responsible for more than 40 instances of careless work and had 13 personal counselling interviews with his superiors directed at improving the erratic quality of his work. See Ohio ¶ 1970.55.

**Claims and appeals procedure—Evidence—Hearsay.**—Where a claimant asserted that a hearing was unfair because he was not advised of the objectionable character of the employer's hearsay evidence and that much of the evidence was double hearsay, the assertions had no merit since formal rules of evidence do not apply in unemployment compensation proceedings. The claim of prejudice by double hearsay was without foundation where facts testified to by the employer's representative that were beyond his personal knowledge were in the nature of either business records or summaries of records or were already properly before the Referee as statements previously made and duly filed in the case. See Ohio ¶ 2020.23.

The decision of the Court of Common Pleas at Ohio ¶ 9449 is affirmed.

determination shall be made by the division within ninety [90] days after the filing of such an application. Until a seasonal determination by the division has been made in accordance with this section, no employer or worker may be considered seasonal.

(c) Any interested party may file an appeal regarding a seasonal determination within fifteen [15] calendar days after the determination by the division and obtain review of the determination in accordance with IC 22-4-32.

(d) Whenever an employer is determined to be a seasonal employer, the following provisions apply:

(1) The seasonal determination becomes effective the first day of the calendar quarter commencing after the date of the seasonal determination.

(2) The seasonal determination does not affect any benefit rights of seasonal workers with respect to employment before the effective date of the seasonal determination.

(e) If a seasonal employer, after the date of its seasonal determination, operates its business or its seasonal operation during a period or periods of twenty-six [26] weeks or more in a calendar year, the employer shall be determined by the division to have lost its seasonal status with respect to that business or operation effective at the end of the then current calendar quarter. The redetermination shall be reported in writing to the employer. Any interested party may file an appeal within fifteen [15] calendar days after the redetermination by the division and obtain review of the redetermination in accordance with IC 22-4-32.

(f) Seasonal employers shall keep account of wages paid to seasonal workers within the seasonal period as determined by the division, and shall report these wages on a special seasonal quarterly report form provided by the division.

(g) The division shall adopt rules applicable to seasonal employers for determining their normal seasonal period or periods. [IC 22-4-14-11, as added by P.L.228-1983, § 4.]

## CHAPTER 15

### DISQUALIFICATION FOR BENEFITS

SECTION.	SECTION.
22-4-15-1. Grounds for disqualification — Exceptions.	22-4-15-4. Income received from other sources.
22-4-15-2. Failure without good cause to apply for or accept suitable work — Determination of suitable work.	22-4-15-6. Discharge for gross misconduct — "Gross misconduct" defined — Benefits held in abeyance.
22-4-15-3. Work stoppage because of labor dispute — Individual not participating — Separate units of work — Exception.	22-2-15-8. Benefits received from private plans excepted.

**22-4-15-1. Grounds for disqualification — Exceptions.** — (a) With respect to benefit periods, including extended benefit periods, established on and after July 3, 1977, and before July 6, 1980, an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause is ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding eight [8] times the

Simon, Anninos & Namanworth Co., L. P. A., Eli Namanworth, 408 Gwynne Bldg., 602 Main St., Cincinnati, Ohio 45202, for plaintiff-appellant. Taft, Stettinius & Hollister, Lawrence C. Mackowiak, First National Bank Center, Fountain Square, Cincinnati, Ohio 45202, for defendant-appellee, Earle M. Jorgensen Co.

PER CURIAM: This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers, including the transcript of the administrative proceedings, from the Court of Common Pleas, Hamilton County, Ohio, the briefs and the arguments of counsel.

Appellant seeks unemployment compensation after termination from his job as a "burner" (cutter of steel plates) at Earle M. Jorgensen Company (employer). His claim was denied at all administrative levels, and these decisions were affirmed by the court of common pleas. In two assignments of error, appellant asserts that he was denied a fair hearing before the administrative referee and that the administrative denial of benefits was unlawful, unreasonable and against the manifest weight of the evidence. We are not persuaded.

The employer is a metal service center that purchases steel from suppliers and processes it to the exact specifications of its customers. Appellant worked as a "burner" for two years and three months, and he was discharged for carelessness. At the referee's hearing under R. C. 4141.28(J) no attorneys were present, appellant representing himself and the assistant general manager representing the employer.

Appellant's first assignment of error asserts the hearing was unfair, because he was not accorded the opportunity to cross-examine, he was not advised of the objectionable character of the employer's hearsay evidence, and much of this evidence was hearsay on hearsay. The statute, however, does not require the strict formality of the rules of procedure and of evidence applicable to judicial hearings. The parties must be afforded "reasonable opportunity for a fair hearing," under R. C. 4141.28(I), which goes on to provide:

In the conduct of such hearing or any other hearing on appeal to the board which is provided in this section, the board and the referees shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. The board and the referees shall take any steps in such hearings, consistent with the impartial discharge of their duties, which appear reasonable and necessary to ascertain the facts and determine whether the claimant is entitled to benefits under the law.

We agree with the common pleas court that the hearing *sub judice* met the statutory standard of fairness. The conduct of the hearing was informal and did not follow the rigorous order of a judicial hearing, but appellant was afforded every reasonable opportunity to question the employer's assertions of carelessness and damage. There was no need to advise appellant that the employer's evidence was objectionable as hearsay, because the rules of evidence do not apply. In addition, much of the damaging evidence against appellant was either admitted by him or within the personal knowledge of the employer's representative. The claim of prejudice by reason of the receipt of double hearsay is without foundation, because those facts testified to by the employer's representative that were beyond his personal knowledge were properly considered by the referee as being in the nature of either business records or summaries of voluminous records, or they were already properly before the referee as statements previously made and duly filed in the case. R. C. 4141.28(J). The first assignment of error has no merit.

Appellant's second assignment asserts that the common pleas court erred in affirming the administrative decision because that decision was unlawful, unreasonable and against the manifest weight of the evidence R. C. 4141.28(O). Our review of the record discloses no breach of law at the administrative level. The transcript of the administrative procedures discloses that during the period of employment, appellant was responsible for more than forty instances of careless work and had thirteen personal counseling interviews with his superiors directed at improving the erratic quality of his work. The decision that appellant was discharged for just cause is both reasonable and supported by the evidence presented to the referee. A reviewing court cannot impose a higher standard of proof than what the statute requires in the administrative proceedings. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St. 2d 41, 430 N. E. 2d 468. The second assignment is meritless.

We affirm.

KEEFE, P. J., BLACK and DWIGHT JJ

**Claimant for unemployment compensation benefits must do more than be passively available and waiting for work** Unemployment Comp. Comm'n, Del. Super., 86 A.2d 856 (1952).  
Lore v.

### § 3315. Disqualification for benefits.

An individual shall be disqualified for benefits:

- (1) For the period of unemployment next ensuing after he has left his work voluntarily without good cause attributable to such work. However, if an individual has left his work involuntarily because of illness, no disqualification shall prevail after he becomes able to work and available for work and meets all other requirements under this title, but the Department shall require a doctor's certificate to establish such availability. Wage credits earned in such work, if employment under this title, shall not constitute benefit wages in connection with §§ 3349-3356 of this title.
- (2) For the period of unemployment next ensuing after an individual has been discharged from his work for just cause in connection with his work. Wage credits earned in such work, if employment under this title, shall not constitute benefit wages in connection with §§ 3349-3356 of this title.
- (3) If he has refused to accept an offer of work for which he is reasonably fitted or has refused to accept a referral to a job opportunity when directed to do so by a local employment office of this State or another state, and the disqualification shall begin with the week in which the refusal occurred and shall continue for the duration of the period of unemployment during which such refusal occurred; provided that no individual shall be disqualified under this subdivision for refusing to accept an offer of work or a referral while he is attending a vocational training course approved by the Department if the acceptance of such offer or referral would prevent him from completing the course. No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept a referral or new work if:
  - a. As a condition of being so employed, he would be required by the employer to join a company union or would be required by the employer to resign from or refrain from joining any bona fide labor organization or would be denied the right by the employer to retain membership in and observe the lawful rules of any such organization; or
  - b. The position offered is vacant due directly to a strike, lockout or other labor dispute; or
  - c. The work is at an unreasonable distance from his residence, having regard to the character of the work he has been accustomed to do, and travel to the place of work involves expenses substantially greater than that required for his former work; or
  - d. The remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
- (4) For any week with respect to which the Department finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed;

weekly benefit amount of his claim. If the qualification amount has not been earned at the expiration of an individual's benefit period, the unearned amount shall be carried forward to an extended benefit period or to the benefit period of a subsequent claim.

(b) With respect to benefit periods established on and after July 6, 1980, an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause is ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until he has earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of eight [8] weeks. If the qualification amount has not been earned at the expiration of an individual's benefit period, the unearned amount shall be carried forward to an extended benefit period or to the benefit period of a subsequent claim.

(c) When it has been determined that an individual has been separated from employment under disqualifying conditions as outlined in this section, the maximum benefit amount of his current claim, as initially determined, shall be reduced by twenty-five percent [25%]. If twenty-five percent [25%] of the maximum benefit amount is not an even dollar amount, the amount of such reduction will be raised to the next higher even dollar amount. When twenty-five percent [25%] of the maximum benefit amount, as initially determined, exceeds the unpaid balance remaining in the claim, such reduction will be limited to the unpaid balance.

(d) The disqualifications provided in this section shall be subject to the following modifications:

(1) An individual shall not be subject to disqualification because of separation from his prior employment if he left to accept with another employer previously secured permanent full-time work which offered reasonable expectation of betterment of wages or working conditions and thereafter was employed on said job for not less than ten [10] weeks or if, having been simultaneously employed by two [2] employers, he leaves one [1] such employer voluntarily without good cause in connection with the work but remains in employment with the second employer for at least ten [10] weeks subsequent to leaving the first employer, or if he left to accept recall made by a base-period employer.

(2) An individual whose unemployment is the result of medically substantiated physical disability and who is involuntarily unemployed after having made reasonable efforts to maintain the employment relationship shall not be subject to disqualification under this section for such separation.

(3) An individual who left work to enter the Armed Forces of the United States shall not be subject to disqualification under this section for such leaving of work.

(4) An individual whose employment is terminated under the compulsory retirement provision of a collective bargaining agreement to which the employer is a party, or under any other plan, system, or program, public or private, providing for compulsory retirement and who is otherwise eligible shall not be deemed to have left his work voluntarily without good cause in connection with the work; however, if such individual subsequently becomes reemployed and thereafter voluntarily leaves work without good cause in connection with the work, he shall be deemed ineligible as outlined in this section.

(5) An otherwise eligible individual shall not be denied benefits for any week because he is in training approved under Section 236(a)(1) [19 U.S.C. § 2296(a)(1)] of the Trade Act of 1974, nor shall the individual be denied benefits by reason of leaving work to enter such training, provided the work left is not suitable employment, or because of the application to any week in training of provisions in this law (or any applicable federal

unemployment compensation law), relating to availability for work, active search for work, or refusal to accept work. For purposes of this subdivision, the term "suitable employment" means with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment (as defined for purposes of the Trade Act of 1974), and wages for such work at not less than eighty percent [80%] of the individual's average weekly wage as determined for the purposes of the Trade Act of 1974.

(e) "Discharge for just cause" as used in this section is defined to include but not be limited to:

- (1) Separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge;
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer;
- (3) Unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness;
- (4) Damaging the employer's property through wilful negligence;
- (5) Refusing to obey instructions;
- (6) Reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours;
- (7) Conduct endangering safety of self or coworkers; or
- (8) Incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction or for any breach of duty in connection with work which is reasonably owed an employer by an employee. [Acts 1947, ch. 208, § 1501, p. 673; 1957, ch. 261, § 1; 1965, ch. 190, § 9; 1967, ch. 310, § 19; 1971, P.L. 355, § 35; 1972, P.L. 174, § 1; 1974, P.L. 110, § 4; 1977, P.L. 262, § 25; 1980, P.L. 158, § 5; 1982, P.L. 95, § 4.]

**Indiana Adm. Code.** For pertinent administrative rules and regulations, see the Statutory Tables in the tables volume of the Indiana Administrative Code.

**Indiana Law Review.** Survey of Recent Developments in Indiana Law, XI Labor Law (Gregory J. Utker), 11 Ind. L. Rev. 196. Survey of Recent Developments in Indiana Law, XI Labor Law (Richard J. Darko), 13 Ind. L. Rev. 295.

**Survey of Recent Developments in Indiana Law, V. Constitutional Law** (Stephen E. Arthur and Christopher D. Seigel), 14 Ind. L. Rev. 196.

**Cited:** Bendix Corp. v. Radecki (1973), 158 Ind. App. 370, 39 Ind. Dec. 376, 302 N. E. (2d) 847; Walker v. Review Bd. of Ind. Emp. Security Div., — Ind. App. —, 76 Ind. Dec. 356, 404 N.E.2d 1363 (1980); Russell v. Review Bd. of Ind. Emp. Security Div., — Ind. App. —, 415 N.E.2d 774 (1981); Forster v. Review Bd. of Ind. Emp. Security Div., — Ind. App. —, 420 N.E.2d 1287 (1981); Pierce Governor Co. v. Review Bd., — Ind. App. —, 426 N.E.2d 700 (1981); Flick v. Review Bd., — Ind. App. —, 443 N.E.2d 84 (1982).

## NOTES TO DECISIONS

### ANALYSIS

In general.  
Application.  
Burden of proof.  
Constitutionality.  
Discharge.  
—Absence or tardiness.  
—Exercise of rights.  
—Just cause.  
—Absence or tardiness.  
—Disobeying instruction or rule.  
—Evidence.  
—Medical examination required by employer.  
—Off-duty conduct.

—Sexual advances.  
—Violence.  
—Misconduct.  
—Fighting.  
—Review.  
—Use of abusive language.  
—Waiver of right to discharge.  
Involuntarily unemployed.  
—Health.  
—Reasonable efforts to maintain employment relationship.  
Judicial review.  
Voluntary termination.  
—Changed working conditions.  
—Early retirement.  
—Good cause.

INDUSTRIAL COMMISSION OF UT/  
DEPARTMENT OF EMPLOYMENT SECURITY

Appeals Section

Decision of Administrative Law Judge

Abdul H. Dailami  
933 North 200 West  
Logan, Utah 84321

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S.S.A. No. 529-29-0539

Case No. 85-A-1283

APPEAL FILED: February 25, 1985

DATE OF HEARING: March 20, 1985

APPEARANCES: Claimant and Employer

PLACE OF HEARING: Logan, Utah

The Department's decision dated February 20, 1985, denied unemployment insurance benefits effective January 27, 1985, on the grounds the claimant was discharged for just cause. Section 35-4-5(b)(1) of the Utah Employment Security Act is quoted on the attached sheet.

FINDINGS OF FACT:

Prior to filing a claim for unemployment insurance benefits effective January 27, 1985, the claimant earned \$10.35 per hour working as a boiler operator for Logan Regional Hospital from September 10, 1980, to January 31, 1985. His weekly benefit amount is \$186 for twenty-six weeks.

The claimant was discharged for failing to operate hospital equipment according to policy. He discovered a leaky water pressure valve and he determined the valve had to be repaired immediately. The system had a by-pass valve to permit the water to continue to flow, but the valve required manual regulation of the pressure. The claimant activated the valve, and he asked one of his co-workers to assist him in watching the pressure valve. When the by-pass valve was turned on, the water pressure was too great and it caused minor flooding on the upper floors of the building. The claimant reduced the pressure and, at a point, the pressure was too low causing employees to complain about no water. The claimant thought he had the valve adjusted correctly and he repaired the faulty part.

The claimant's supervisor later learned that there had been a shut-down of the water system and he terminated the claimant. The claimant was aware of the proper procedures to operate the water system and he believed he had performed the task correctly. He stated the water never stopped flowing through the system. There had been three prior occasions when the claimant had been involved in equipment shutdowns. He had received two disciplinary counseling actions and a reprimand for the incidents.

REASONING AND CONCLUSION OF LAW:

The disqualification provided in Section 5(b)(1) does not apply where evidence shows the discharge was due to inefficiency, unsatisfactory conduct, failure in



good performance as the result of inability or incapability, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgement.


A denial of unemployment insurance benefits following a discharge is based on a fault concept, as explained in the following decision:

When an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are clearly beyond the claimant's control. The fact of willful or wanton conduct is not established merely by the claimant's knowledge that he is violating a reasonable rule of the employer; rather, it must be shown from the evidence that the claimant knew or had reason to know that his conduct may result in loss of employment. (Utah Board of Review, 80-BR-322.)

In the present case, the claimant testified credibly he believed he had handled the procedures to switch the water to the by-pass system in order to repair the pressure valve correctly. It was unclear how long any unit of the hospital may have been without water or had the water supply curtailed, but the evidence established the claimant had made a valid effort to keep the system operating effectively. Even though he may have been previously involved in incidents detrimental to the hospital's equipment, the testimony did not establish culpable negligence or a disregard for the employer's interest in his actions. It is held the circumstances were the result of inadvertent conditions beyond the claimant's power to control and it is concluded he was not discharged for just cause in accordance with the Utah Employment Security Act.

DECISION:

The decision of the Department representative is reversed and benefits are allowed effective January 27, 1985, pursuant to Section 35-4-5(b)(1) of the Utah Employment Security Act provided the claimant is otherwise eligible.

  
Terry J. Kump  
Administrative Law Judge  
DEPARTMENT OF EMPLOYMENT SECURITY

This decision will become final unless within ten days from March 26, 1985, further written appeal is made to the Board of Review (P. O. Box 11600, Salt Lake City, Utah 84147) setting forth the grounds upon which the appeal is made.

jsn  
Attachment

cc: Logan Regional Hospital  
1400 North 500 East  
Logan, Utah 84321

BOARD OF REVIEW  
The Industrial Commission of Utah  
Unemployment Compensation Appeals

ABDUL H. DAILAMI  
S.S.A. No. 529 29 0539

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

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:  
Case No. 85-A-1283  
:  
DECISION  
:  
Case No. 85-BR-210  
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After careful consideration of the record and testimony in the above-entitled matter, the Board of Review finds the decision of the Administrative Law Judge to be fair and unbiased and supported by competent evidence and, therefore, affirms such decision allowing benefits to the claimant effective January 27, 1985, and continuing, provided he is otherwise eligible, on the grounds he was discharged from his employment for conduct which is not disqualifying under the provisions of §35-4-5(b)(1) of the Utah Employment Security Act. In so holding, the Board of Review hereby adopts the findings of fact and conclusion of law of the decision of the Administrative Law Judge.

In affirming the decision of the Administrative Law Judge, the Board of Review notes the employer's argument that the Administrative Law Judge applied an erroneous standard to the case. Specifically, it is the employer's contention that the quotation by the Administrative Law Judge of a 1980 decision evidences an application of the willful or wanton conduct standard, whereas the Legislature in 1983 added a "just cause" standard. However, a review of the decision of the Administrative Law Judge shows that his purpose in quoting a portion of a 1980 Board of Review decision was simply to explain that there must be a showing from the evidence that the claimant knew or had reason to know his conduct might result in loss of employment. This standard relates to the fault concept applicable to disqualifications from receipt of unemployment benefits. The Utah Supreme Court has very recently stated that "[N]ot every cause for discharge provides a basis to deny eligibility for unemployment compensation." Board of Education of Sevier County School District v. Board of Review, 11 Utah Adv. Rep. 15, 17 (1983), Case No. 19760, quoting Clearfield City v. Department of Employment Security, Utah, 663 P.2d 440, 441 (1983).

In the case of Kehl v. Board of Review, 10 Utah Adv. Rep. 29 (1985), Case No. 20193, cited by the employer in its brief to the Board, the Utah Supreme Court reviewed the case law of Delaware, Ohio, and Indiana in its consideration of the meaning of the term "just cause." The court then reviewed the Department's proposed Rule A71-07-1:5(II)-1 in light of the meaning given "just cause" in other jurisdictions and concluded that the

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Case No. 85-A-1283

DECISION

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proposed Rules and Regulations are within the limits of reasonableness and rationality. It should be noted that the proposed rule is not binding at this point in time, as it has not become final. However, it provides guidance in an area that is new to this jurisdiction, that is, the meaning of the term "just cause."

The proposed rule provides that the basic factors for establishing fault are culpability, knowledge, and control. In reviewing the negligence complained of by the employer in the instant case against those factors, the Board of Review finds that the claimant's failure to control the water pressure in the building with a bypass valve while trying to repair the regular valve was beyond the claimant's control. It was this incident which led to the claimant's discharge. All of the prior incidences of which the employer complains occurred in 1983, with the exception of one which occurred in September of 1984. While the incidences which occurred in 1983 may be within the claimant's control, the employer chose not to discharge the claimant at that time. The employer also complains that the claimant failed to repair a malfunctioning water heater for a period of two years. The question must be asked why the employer allowed the claimant to take two years to effect the necessary repairs to the water heater.

Although the employer has provided evidence of incidences where the claimant failed to properly perform his duties, the record is devoid of any evidence to show that the claimant acted with culpability. The term culpability has previously been defined by the Supreme Court as referring to how serious the claimant's conduct affects his job or the employer's rightful interests. See Clearfield City v. Board of Review, supra.

Based on the evidence of record in this case, the Board of Review concludes that the employer has failed to show that the claimant's performance was the result of anything other than inability, incapacity or isolated instances of inadvertencies or ordinary negligence in isolated instances. Under such circumstances, the allowance of benefits must be affirmed.

BOARD OF REVIEW  
The Industrial Commission of Utah  
Unemployment Compensation Appeals

ABDUL H. DAILAMI  
S.S.A. No. 529 29 0539

vs.

DEPARTMENT OF EMPLOYMENT SECURITY

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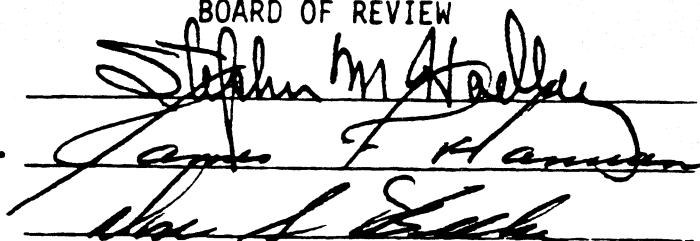
- Page 3 -

This decision will become final ten days after the date of mailing hereof, and any further appeal must be made directly with the Utah Supreme Court at the State Capitol Building, Salt Lake City, Utah, within ten days after this decision becomes final. To file an appeal with the Supreme Court, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35-4-10(i) of the Utah Employment Security Act, followed by a Docketing Statement and a Legal Brief.

BOARD OF REVIEW

Dated this 18th day of June, 1985.

Date Mailed: June 21, 1985.



0010

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the foregoing Appellant's Brief, postage prepaid, this 24<sup>th</sup> day of September, 1985, to the following:

K. Allan Zabel  
SPECIAL ASSISTANT  
ATTORNEY GENERAL  
1234 South Main  
Salt Lake City, Utah 84147

Abdul H. Dailami  
933 North 200 West  
Logan, Utah 84321

  
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