

2008

Mineral Resources International, Inc. v.
Department of Workforce Services, Stephen R.
Davis : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MINERAL RESOURCES
INTERNATIONAL, INC.,

Petitioner/Appellant

vs.

DEPARTMENT OF
WORKFORCE SERVICES,
and STEPHEN R. DAVIS,

Respondents/Appellees.

Docket No. 20080943-CA

REPLY BRIEF OF APPELLANT

Appeal from the Utah Department of Workforce Services, Agency Decision Nos.
08-R-00497, 08-B-00416 and 08-A-04328-R.

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ORAL ARGUMENT REQUESTED

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ORAL ARGUMENT REQUESTED

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ARGUMENT

THE BOARD HAS MISAPPREHENDED THE NATURE AND SCOPE OF MRI'S APPEAL, AND ITS ARGUMENTS ARE EITHER WITHOUT MERIT OR INAPPOSITE TO THE SALIENT ISSUES RAISED IN MRI'S APPEAL; ALTERNATIVELY, THE BOARD IS REQUESTING AFFIRMANCE OF THE BOARD'S DECISION BASED ON AN ALTERNATE THEORY THAT IS NOT SUPPORTED BY THE RECORD OR THE FINDINGS OF THE ALJ/BOARD.

I. Nature of the Board's Decision

In MRI's initial appeal to the Workforce Appeals Board ("Board") from the decision of the Administrative Law Judge ("ALJ"), MRI requested the Board to consider "other uncontroverted factual evidence presented at the hearing."

However, the Board declined to make new factual findings or to alter the ALJ's decision in any manner, stating the following:

The Workforce Appeals Board adopts in full the factual findings of the Administrative Law Judge (R. 128) . . . Since the Administrative Law Judge is in the unique position of being an active participant in the hearing, interacting with the parties and also questioning the witnesses, the Judge's findings will generally be disturbed by the Board with great reluctance . . . if there is any substantial evidence in the record to support the findings made by the Administrative Law Judge, the Board will generally not attempt to substitute its own judgment for that of the Judge. In this case the Employer failed to meet its burden of proof. There is substantial evidence in the record to support the Administrative Law Judge's findings of fact, and the Board concurs fully with those findings and does not find the Employer's challenge to them compelling. The Workforce Appeals Board also adopts in full the reasoning, conclusions of law, and decision of the Administrative Law Judge (R. 131).

MRI has not appealed any of the factual findings of the ALJ (as adopted by the Board). Accordingly, the majority of the Board's decision—which did nothing

more than evaluate whether the ALJ's factual findings were supported by substantial evidence—is inapposite to MRI's appeal. Furthermore, by adopting in full the reasoning, conclusions of law and decision of the ALJ, the Board demonstrated the intent to refrain from altering or supplementing the ALJ's decision in any manner.¹ Therefore, for purposes of appeal the Court of Appeals should treat the Board's decision as being the identical to the ALJ's decision.

II. Standard of Review

MRI agrees with the Board's argument that—to the extent MRI's appeal involves a pure question of fact—the proper standard of review should be the “clearly erroneous” or “plain abuse of discretion” standard. However, the Board's characterization of such standard of review is incomplete. Another requirement for a party challenging an agency's factual findings is that such party must properly present the record by marshalling all of the evidence supporting the agency's factual findings and show that despite the supporting facts and all reasonable inferences drawn therefrom, the factual findings are not supported by substantial evidence given the record as a whole.” *EAGALA v. Dept. of Workforce Services*, 2007 UT App 43, ¶ 8, 157 P.3d 334, 337; *Tasters Ltd., Inc. v. Dept. of Empl. Sec.*, 863 P.2d 12, 18 (Utah Ct. App. 1993).

The only party challenging a pure factual finding in relation to this appeal appears to be the Board—to the extent the Board may be challenging on appeal

¹ Thus, any factual findings, legal conclusions and reasoning of the Board's decision that were inconsistent with the factual findings, legal conclusions and reasoning of the ALJ's decision did not supercede the ALJ's findings, conclusions or reasoning, and were inapposite to the Board's ultimate “adopted” decision.

(either directly or implicitly) any of the factual findings made by the ALJ (and adopted in full by the Board) in the administrative proceedings below. However, principles of judicial estoppel should prevent the Board from attacking its own factual findings² on appeal. *See, Occidental/Nebraska Federal Savings Bank v. Mehr*, 791 P.2d 217, 220 (Ut. Ct. App. 1990) (“[g]enerally in legal proceedings a party with knowledge of all the facts will not be allowed to take a position, pursue that position to fruition, and later, with no substantial change of circumstances, return to attack the validity of the prior position or the outcome flowing from it”), quoting from 28 Am.Jur.2d *Estoppel and Waiver*, §§ 68-70 (1966).

Moreover, to the extent that principles of judicial estoppel do not prevent the Board from challenging its own factual findings, as a prerequisite to appellate review, the Board should be required to properly present the record on appeal by marshalling the evidence. Only if the Board has satisfied such “marshalling” requirement, should the Appellate Court proceed to the next step of applying the “clearly erroneous” and “plain abuse of discretion” standard in reviewing any arguments of the Board that appear to attack the Board’s own factual findings.

MRI has not appealed any of the factual findings made by the ALJ (as adopted in full by the Board), but rather, has appealed only certain legal conclusions of the ALJ (as adopted in full by the Board). Accordingly, as MRI stated in its initial brief, the proper standard of review to be applied to the issues presented by MRI in this appeal is whether the particular legal conclusions of the

² The Board “adopt[ed] in full the factual findings of the Administrative Law Judge” (R. 128).

ALJ/Board contested by MRI in this appeal were “rational and reasonable,” because they were supported by “substantial evidence.”

Finally, the Board’s suggestion that the Board’s decision should be affirmed on an alternate legal ground or theory requires the Appellate Court to apply even a different standard of review. In order for the Appellate Court to affirm the Board’s administrative decision on an alternate ground or theory, the Board must not only demonstrate that the alternative ground or theory is apparent on the record, but must also show that the alternate legal theory is sustainable based on the factual findings actually made by the Board in the administrative proceeding. *See, State v. Topanotes*, 2003 UT 30, ¶ 9, 76 P.3d 1159, 1161.

III. Summary of Arguments

In its “Summary of Arguments,” the Board misconstrued the nature of MRI’s arguments on appeal, stating the following:

Petitioner . . . argues that the Administrative Law Judge and the Workforce Appeals Board erred in failing to properly consider three pertinent facts: that the Claimant was a short-term employee; that the Claimant continued to use profane language in the workplace after having received a verbal warning for the offending activity; and that the Claimant had improperly disclosed confidential information.

Although those three facts are relevant to MRI’s arguments on appeal in varying degrees, the Board’s purported “summary” of MRI’s arguments on appeal has grossly misstated the key elements of MRI’s argument on appeal.

MRI’s actual argument on appeal can be summarized as follows:

The ALJ made one key factual finding and three key preliminary legal conclusions

(all of which were adopted in full by the Board), which established a *prima facie* case of “culpability” in this case as a matter of law. The key factual finding was that Davis had discussions with production staff approximately twice per week wherein he discussed that he felt there were problems with how the company was operated, and in which he mentioned that cash reserves were too low and payroll was too high (R. 95). The three key preliminary legal conclusions were the following: (1) Stephen Davis (“Davis”) admitted that he made derogatory statements about MRI’s finances to nonmanagement and nonaccounting personnel (R. 97); (2) the behavior of Davis in speaking negatively about MRI’s finances was potentially harmful as it could affect employee morale (R. 97); and (3) Davis should have known that making negative statements about MRI’s finances could be harmful to company morale, given his position within the company (R. 97).³

The ALJ’s/Boards’s other preliminary legal conclusions did not effectively rebut, revoke or neutralize such *prima facie* case of “culpability,” because they were legally irrelevant to the issue of culpability in this case. Such legal conclusions were: (1) MRI has not shown that Davis ever provided “specific” financial information to anyone outside of the accounting and management staff (R. 97); (2) the proper emphasis under the culpability requirement should not be the number of violations; rather, it should address the problem of whether the

³Despite making the four findings set forth above, which clearly established that Davis improperly disclosed confidential information about the finances of MRI, the Board has argued—“unreasonably and irrationally”—in its Summary of Arguments (p.5) that “there is no competent evidence in the record to establish that the claimant improperly disseminated any confidential information concerning the employer.”

discharge was necessary to avoid actual or potential harm to the employer's rightful interest (R.97); and (3) MRI could easily have issued Davis a formal warning or suspended Davis, and it is likely his conduct would improve (R. 97).

Therefore, the ALJ's/Board's ultimate findings, that (1) Davis' conduct was not so harmful as to warrant discharge (R. 97), and (2) "culpability" was not established (R. 97), were *not* "rational and reasonable" and were *not* supported by "substantial evidence," not only because they were contrary to the ALJ's/Board's own factual findings and preliminary legal conclusions, which clearly established "culpability," but also because they were based solely on other legal conclusions that were legally irrelevant to the issue of "culpability" in this case. Accordingly, MRI met its burden in establishing "culpability." Whereas the ALJ/Board also concluded that MRI established the other elements of "knowledge" and "control," MRI met its burden in establishing "just cause" concerning Davis' discharge.

IV. Rebuttal of the Board's Arguments

A. The Board's determination was not supported by substantial evidence

The Board has argued that the Board's ultimate determination—that MRI failed to prove the culpability element of a just cause termination—was supported by substantial evidence in the record. However, the Board's determination was based on faulty legal reasoning, and therefore, was unreasonable and irrational.

1. *Prima facie* case of culpability

(a) Key factual finding

As has been mentioned above, the ALJ made one key factual finding and

three key preliminary legal conclusions (all of which were adopted in full by the Board), which established a *prima facie* case of “culpability” in this case as a matter of law.

The key factual finding was that Davis had discussions with production staff twice per week, wherein he discussed how the company was being operated, and wherein he mentioned that cash reserves were too low and payroll was too high (R. 95). It should not take a rocket scientist to figure out that, if a key member of the accounting staff (who is perceived to have access to confidential information about the finances of the company) repeatedly tells members of the production staff (who are lower level employees with no personal input into employment decisions or lay-offs) that the company’s cash flow is too low and the company’s payroll is too high, those members of the production staff will most likely become concerned and worried about the stability of their employment with the company, which will affect company morale—regardless of whether that member of the accounting staff discloses more “specific” financial information.

The predictability of that scenario should have just been common sense to anyone with any kind of experience in the workforce. It was easily foreseeable that MRI’s production workers might conclude that (1) if cash flow was too low and expenses were too high, (2) it was because sales were too low, which would mean inventory was too high, and (3) that situation could result in lay offs in the production department (which produces inventory), putting their jobs at risk.

Based on the foregoing, it is clear that such factual finding was consistent

with and provided substantial evidentiary support for the ALJ's three key legal conclusions, which established a *prima facie* case of "culpability" in this case, namely, (1) that Davis admitted he made derogatory statements about MRI's finances to non-management and non-accounting personnel (R. 97); (2) that Davis' behavior in speaking negatively about MRI's finances was potentially harmful as it could affect employee morale (R. 97); and (3) that Davis should have known that making negative statements about MRI's finances could be harmful to company morale, given his position within the company (R. 97). It is also clear that such factual finding constituted substantial evidence, which directly controverted some of the ALJ's/Board's other legal reasoning—namely, that because Davis did not share "specific" financial information about MRI's finances, Davis' conduct was not so harmful as to warrant discharge (R. 97).

Principles of judicial estoppel should prevent the Board from attacking the above-described key factual finding on appeal. *See, Occidental/Nebraska Federal Savings Bank v. Mehr, supra*, 791 P.2d at 220 ("[g]enerally in legal proceedings a party with knowledge of all the facts will not be allowed to take a position, pursue that position to fruition, and later, with no substantial change of circumstances, return to attack the validity of the prior position or the outcome flowing from it"). However, even if the Board was not barred from attacking such factual finding on appeal, as a prerequisite to appellate review, the Board was required to properly present such issue to the Appellate Court by marshalling the evidence to demonstrate that such factual finding was not supported by substantial evidence.

EAGALA v. Dept. of Workforce Services, supra, 2007 UT App 43, ¶ 8, 157 P.3d at 337; *Tasters Ltd., Inc. v. Dept. of Empl. Sec., supra*, 863 P.2d at 18. Whereas the Board has not marshaled the evidence related to such factual finding, such factual finding should be deemed conclusive for purposes of this appeal. *See, Bhatia v. Dept. of Empl. Sec.*, 834 P.2d 574, 579 (Utah Ct. App. 1992) (findings not adequately challenged are deemed to be conclusive).

(b) Key legal conclusions

As was mentioned above, the ALJ made three key preliminary legal conclusions (all of which were adopted in full by the Board), which established a *prima facie* case of “culpability” in this case as a matter of law, namely, (1) that Davis admitted he made derogatory statements about MRI’s finances to non-management and non-accounting personnel (R. 97); (2) that Davis’ behavior in speaking negatively about MRI’s finances was potentially harmful as it could affect employee morale (R. 97); and (3) that Davis should have known that making negative statements about MRI’s finances could be harmful to company morale, given his position within the company (R. 97).

In order to establish “culpability,” the conduct causing discharge must be so serious that continuing the employment relationship would jeopardize the employer’s rightful interest. UTAH ADMIN. CODE r. 994-405-202(1) (2000). If the conduct causing discharge was not an isolated incident of poor judgment, *or* if there was an expectation that such conduct would be continued or repeated, culpability could be established by showing only potential harm (rather than actual

harm) to the employer's rightful interest. *C.f.*, UTAH ADMIN. CODE r. 994-405-202(1) (2000) ("[i]f the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown."). Conduct that would bring dishonor to the business or that would harm employee morale is specifically listed in the applicable regulations as conduct that would harm the employer's rightful interest. *See*, UTAH ADMIN. CODE r. 994-405-211 (2000).

In addition, conduct is "not an isolated incident of poor judgment," (1) if it constitutes a pattern of behavior, *cf.*, *Nelson v. Dept of Empl. Sec.*, 801 P.2d 158, 162 (Utah Ct. App. 1990) (employee was found to be culpable based on a pattern of behavior); or (2) if the conduct was a volitional act by an employee who could not have been heedless of the consequences of such behavior. *See, Fieeiki v. Dept. of Workforce Services, supra*, 2005 UT App 398 ¶¶ 4-5, 122 P.3d 706, 708 (potential harm was sufficient to establish culpability, because claimant's action was not an innocent act of poor judgment or ordinary negligence, but rather, was a volitional act with consequences of which the claimant was or should have been aware because of his experience and training).

In this case, the three legal conclusions of the ALJ/Board described above clearly established a *prima facie* case of "culpability," because they expressly held that (1) Davis engaged in prohibited behavior, (2) which was potentially harmful to the rightful interests of MRI whereas it could affect employee morale, and (3) such conduct was "not an isolated incident of poor judgment," whereas Davis

should have known that making negative statements about MRI's finances could be harmful to company morale, given his position within the company.⁴

Principles of judicial estoppel should prevent the Board from attacking such three key legal conclusions on appeal. *See, Occidental/Nebraska Federal Savings Bank v. Mehr, supra*, 791 P.2d at 220. However, even if the Board was not barred from attacking its own such legal conclusions on appeal, to successfully attack such legal conclusions, the Board was required to show that such legal conclusions were *not* “reasonable and rational,” by applying the “substantial evidence test,” which requires the Appellate Court to examine all of the evidence supporting the contested findings, and then to determine whether, despite the supporting facts and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence given the record as a whole. *See, Petro-Hunt, LLC v. Dept. of Workforce Services*, 2008 UT App 391 ¶ 20, 197 P.3d 107, 114.

Based on the “substantial evidence” test, it follows that if the Board desired to attack the validity of the three key legal conclusions set forth above, the Board should be required to marshal the evidence relevant to that attack—which the Board has not done. Whereas the Board has not marshaled the evidence related to such legal conclusions, such legal conclusions should be deemed conclusive for purposes of this appeal. *See, Bhatia v. Dept. of Empl. Sec., supra*, 834 P.2d at 579 (findings not adequately challenged are deemed to be conclusive).

⁴ The key factual finding described on page 7 above demonstrates that Davis' conduct also constituted a pattern of behavior—which could bring dishonor to MRI and detrimentally affect employee morale—providing a second basis for allowing “potential harm” to be used in establishing culpability.

Furthermore, the three key legal conclusions described above *were* supported by substantial evidence. The key factual finding described above on page 7 provided substantial support for the first legal conclusion—and describes some of the confidential information disclosed by Davis. In addition, the testimony of Marysa Cardwell, MRI's HR director, as well as Exhibits 8, 14, 15 and 16 (R. 8, 14, 15, 16; R. 57, lines 10-21, 43; R. 58, lines 1-5, 20-28) all supported the second legal conclusion set forth above.

Exhibit 8 was an anonymous note to Marysa Cardwell, stating that Davis' conduct (which included saying things in the break room that sounded very confidential) created an uncomfortable work environment. Exhibit 14 was the position statement of MRI concerning Davis' discharge, which stated that Davis' conduct in telling other employees that MRI was in financial trouble caused a morale problem at MRI with other employees. Exhibit 15 was a letter from employee Lesha Dalebout of MRI, stating that Davis' negative statements about company owners created a very negative work environment. Exhibit 16 was a letter from Amy Sim, which stated that Davis' conduct in disclosing MRI's confidential financial information to other employees created an uncomfortable work environment for her. Finally, Ms. Cardwell testified that employees (the four or five employees she interviewed) had complained to her about Davis' behavior in providing negative financial information about the company and how that made them uncomfortable (R. 57, line 43; R. 58, lines 1-5, 20-28).

The Board has argued on page 7 of the Brief of Appellee that such evidence

was hearsay, and therefore, was not “competent” to independently support a legal conclusion, pursuant to the “residuum rule.” However, such evidence was not offered for the truth of such statements, but only to show there was a “perception” that Davis’ behavior was creating an uncomfortable work environment—which inherently created a company morale issue. Whereas company morale is a subjective determination, formulated by a company’s employees, the mere *perception* by other employees that Davis was causing problems was sufficient to prove there was an *actual* problem with company morale. *Cf., Prosper, Inc. v. Dept. of Workforce Services*, 2007 Ut App 281, ¶ 13, 168 P.3d 344, 347.⁵

Finally, the third legal conclusion was substantially supported by the key factual finding set forth on page 7 above and by the ALJ’s additional factual finding that Davis had “nearly 30 years of experience in the accounting field and is knowledgeable about ethical standards in the field regarding disclosure of confidential information regarding his employers” (R. 94-5).

2. The Board’s other preliminary legal conclusions did not effectively rebut, revoke or neutralize such *prima facie* case of culpability.

In a preliminary legal conclusion, the ALJ/Board placed great emphasis on declaring that the confidential financial information disclosed by Davis was not “specific”—in an apparent attempt to discount the seriousness of Davis’ behavior.

⁵ The issue of employee morale in this case was directly analogous to the issue of customer service in the *Prosper* case, whereas the mere fact that complaints about Davis were made by other employees created an inherent problem with employee morale, because employee morale clearly relates to the subjective perception of the complaining employees—i.e., if several complaining employees subjectively perceive that there is a problem being caused by another employee, regardless of the basis for that perception, then there is a problem, and employee morale is affected.

However, the Board cited no legal support whatsoever for its arbitrary reasoning that disclosure of confidential financial information could be harmful only if such information was “specific.” In fact, disclosure of “specific” financial information may have actually been less harmful to MRI—if specific information would have made it clear to the production staff that Davis’ generalizations about MRI’s financial condition were grossly exaggerated, for example. Furthermore, the fact that Davis disclosed to the production staff the “general” information that “cash reserves were too low and payroll was too high” created at least a *potential* employee morale problem at MRI, and the ALJ made a specific legal conclusion to that effect. Therefore, the fact that the confidential financial information disclosed by Davis may not have been “specific” was of no legal significance whatsoever to the determination of culpability in this case, and such legal conclusion did not rebut, revoke or neutralize the *prima facie* case of culpability established by the Board’s other findings and preliminary legal conclusions.

The Board also ruled that the proper emphasis under the culpability requirement should not be the number of violations, but rather, should be whether the discharge was necessary to avoid actual or potential harm to the employer’s rightful interest. Apparently, the Board reasoned that culpability should not be established merely because the offending conduct was a pattern of bad behavior, rather than only one serious incident of conduct. However, as was argued in MRI’s Brief of Appellant on pages 46-7, the fact that behavior is repeated usually increases, rather than decreases, the possibility that the employer’s interests may

have been jeopardized, and Utah case law is consistent with that principle. *See, Nelson v. Dept of Empl. Sec., supra*, 801 P.2d at 162. Accordingly, the ALJ's/Board's preliminary legal conclusion about the "number of violations" did not rebut, revoke or neutralize the *prima facie* case of culpability established by the Board's other factual findings and preliminary legal conclusions.

Finally, the Board made the preliminary legal conclusion that MRI could easily have issued Davis a formal warning or suspended Davis, and it is likely his conduct would have improved. However, the evidence in the record clearly offered more support for the proposition that Davis was not likely to improve his behavior, as MRI argued in the Brief of Appellant on pages 47-8. In addition, MRI only needed to prove either that (1) Davis's conduct was not an isolated incident of poor judgment, or (2) there was no expectation that such conduct would be continued or repeated. Therefore, such issue was inapposite to the determination of whether culpability had been proven, because the ALJ issued a legal conclusion establishing that Davis' conduct was not an isolated incident of poor judgment, as set forth above on pages 10-11. Accordingly, such preliminary legal conclusion of the ALJ/Board did not rebut, revoke or neutralize the *prima facie* case of culpability established by the Board's other findings and conclusions.

It would have been irrational and unreasonable for the ALJ/Board to conclude that the numbers—1 and 1—had been proven, and then to conclude that the sum of $1 + 1 = 0$. It was equally irrational and unreasonable for the ALJ/Board to establish a *prima facie* case of culpability—by concluding that (1) Davis

admitted he made derogatory statements about MRI's finances to non-management and non-accounting personnel; (2) Davis' behavior in speaking negatively about MRI's finances was potentially harmful as it could affect employee morale; and (3) Davis should have known that making negative statements about MRI's finances could be harmful to company morale, given his position within the company—and then to arbitrarily make the polar-opposite ultimate determination that culpability had not been established, simply by concluding that Davis' conduct was not so harmful as to warrant discharge, without any reasonable or rational logic or explanation for doing so.⁶

B. Alternate theory of “no proximate cause”

1. The Board's alternate argument

Based on the Brief of Respondent, it appears the Board is also requesting the Appellate Court to affirm the Board's decision, based on an alternate legal theory, raised for the first time on appeal. The Board's alternate legal theory appears to be that (1) there was no proximate cause between the alleged conduct stated by MRI to be the basis for Davis' discharge, and Davis' discharge in this case, and (2) MRI did not establish sufficient basis for a “just cause” discharge, based on “conduct” other than the stated cause for discharge.

2. Applicable law concerning the Board's alternate argument

It is well settled that an appellate court may affirm a judgment appealed

⁶ As was explained on pages 13-15 above, the Board's stated reasoning for its ultimate conclusion was inapposite to the issue of culpability in this case, and therefore, was not “rational and reasonable.”

from, if it is sustainable on any legal ground or theory apparent on the record, even if such ground or theory was not raised or considered in the lower court. *State v. Topanotes, supra*, 2003 UT 30, ¶ 9, 76 P.3d at 1161. However, (1) not only must the alternative ground be apparent on the record, (2) it must also be sustainable based on the actual factual findings of the trial court. *Id.*

The relevant portion of UTAH ADMIN. CODE r.994-405-206, which deals with the issue of “proximate cause” related to a discharge, reads as follows:

R994-405-206. Proximate Cause – Relation of the Offense to the Discharge.

(1) The cause for discharge is the conduct that motivated the employer to make the decision to discharge the claimant. If a separation decision has been made, it is generally demonstrated by giving notice to the claimant. Although the employer may learn of other offenses following the decision to terminate the claimant’s services, the reason for the discharge is limited to the conduct the employer was aware of prior to making the separation decision. If an employer discharged a claimant because of preliminary evidence, but did not obtain “proof” of conduct until after the separation notice was given, it may still be concluded the discharge was caused by the conduct the employer was investigating.

(2) If the discharge did not occur immediately after the employer became aware of an offense, a presumption arises that there were other reasons for the discharge. The relationship between the offense and the discharge must be established both as to cause and time. The presumption that a particular offense was not the cause of the discharge may be overcome by showing the delay was necessary to accommodate further investigation, arbitration or hearings related to the claimant’s conduct.

3. The Board’s alternate theory is not apparent on the record

(a) MRI’s failure to identify a “final incident” was not legally significant

On page 5 of the Brief of Respondent, the Board argued that “[a]s the Administrative Law Judge noted in her reasoning on the culpability element of a

just cause discharge, the employer provided no specific final incident which led to the discharge that could be adjudicated.” On page 6 of the Brief of Respondent, the Board stated that the “Administrative Law Judge who conducted the hearing was unable to find a final incident for the discharge.”

In the arguments set forth above, the Board mischaracterized the legal conclusions of the ALJ concerning that issue. The actual ruling of the ALJ was as follows:

The Employer provided no final incident that led to the Claimant’s discharge, but argues that the Claimant habitually “badmouthed” the company and the management. The Employer further argues that the Claimant was discharged because he revealed confidential financial information about the company to nonmanagement and nonaccounting personnel (R. 97).

Although the ALJ ruled that MRI “provided no final incident that led to [Davis’] discharge,” the ALJ did not rule that “the employer provided no specific final incident which led to the discharge that could be adjudicated.” (Emphasis added.) Furthermore, the record demonstrates that the ALJ actually adjudicated this case based solely on her analysis and legal conclusions concerning “just cause” in relation to MRI’s stated reason for discharge—namely, that Davis had improperly disclosed MRI’s confidential financial information (R. 97).

In this case, the record shows that the “event” that actually led to the discharge of Davis was the discovery by MRI of information—pursuant to an investigation—concerning the extent of Davis’ conduct in improperly disclosing confidential financial information to other employees of MRI and the extent of the

harm caused to employee morale by such conduct (R. 7; R. 55, lines 24-29, 39-44; R. 56, lines 1-2; R. 58, lines 20-28; R. 67, lines 12-43; R. 68, lines 1-6, 19-26).

The “conduct” stated by MRI to be the cause for discharge was a pattern of behavior by Davis in disclosing confidential, financial information of MRI to nonmanagement, nonaccounting personnel at MRI (R. 7; R. 10; R. 55, lines 24-29, 39-44; R. 56, lines 1-2; R. 68, lines 19-26; R. 95; R. 97; R. 129-130). That was the cause for discharge provided to Davis at the time he was discharged (R. 10; R. 68, lines 19-26). That was the cause for discharge provided to the unemployment claims examiner (R. 6-7). That was the cause for discharge presented to the ALJ at the formal administrative hearing (R. 7; R. 55, lines 24-29, 39-44; R. 56, lines 1-2; R. 58, lines 20-28; R. 68, lines 19-26). And, that was the cause for discharge actually analyzed by the ALJ in her decision (R. 97).

The law does not require an employer to provide a “specific final incident” as the basis for discharge in order to establish that the discharge was for “just cause.” UTAH ADMIN. CODE r.994-405-206(1) states that the cause for discharge is the “conduct” that motivated the employer to make the decision to discharge the claimant. The common legal definition of the term “conduct” is “[a]n action or omission and its accompanying state of mind, or, where relevant, a series of acts or omissions.” Black’s Law Dictionary 296 (6th ed. 1990). (Emphasis added.)

Based on the common definition of “conduct,” there is no question the “cause for discharge” could include a pattern of behavior—a series of acts or omissions—rather than merely a single incident. *See, Nelson, supra*, 801 P.2d at

162 (claimant was found culpable based on a pattern of less serious, but repeated, violations of company policy). Therefore, as a matter of law, there was no lack of “proximate cause” between the stated reason for the discharge and the discharge—nor was there a fatal flaw in MRI’s claim of discharge for “just cause”—simply because MRI did not specify a “final incident” that led to Davis’ discharge.

(b) A proper time nexus existed between the “conduct” and the discharge

On page 10 of the Brief of Respondent, the Board argued that MRI failed to establish when the alleged offenses occurred in relation to the date of termination. Accordingly, by implication, the Board has argued that there was no proximate cause—no proper relationship or nexus in time—between the conduct and the discharge, and therefore, that there was a presumption in this case that the real reason or cause for the discharge was something other than the stated cause for the discharge. See, UTAH ADMIN. CODE r.994-405-206(2). However, evidence supporting such argument is not apparent in the court record.

As was stated above, the cause for discharge alleged by MRI was a pattern of conduct by Davis in improperly disclosing confidential financial information to MRI’s production staff. On the face of the record, it is clear MRI first received notice of a potential problem on Tuesday, April 29, 2008⁷ (R. 11). It is also clear

⁷ Exhibit 11, entitled “Statement SP – Separation (Discharge),” states the following: “[Marysa Anderson] found out 3 days prior to the claimant’s termination that he was still being negative and prompted an investigation which led to his discharge.” The contents of such Exhibit 11 constitute legally competent evidence, as a hearsay exception pursuant to Utah Rules of Evidence Rule 803(8)(C), whereas such exhibit is a public report “setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law.”

from the record that after MRI received such information, MRI promptly conducted an investigation, and then terminated Davis at the conclusion of such investigation without delay—3 days after beginning the investigation—on Friday, May 2, 2008 (R. 11; R. 55, lines 24-29; R. 95, lines 32-34; R. 130, lines 1-2).

UTAH ADMIN. CODE r.994-405-206(2) states that if the discharge did not occur immediately after the employer became aware of the offense, a presumption arises that there were other reasons for the discharge. However, UTAH ADMIN. CODE r.994-405-206(2) also states that the presumption that a particular offense was not the cause of the discharge may be overcome by showing the delay was necessary to accommodate further investigation related to the claimant's conduct.

In this case, although MRI was given “notice” of alleged conduct of Davis on April 29, 2008, MRI did not actually become “aware” of such conduct until it had an opportunity to conduct an investigation, which it conducted immediately after being put on notice concerning the alleged conduct, and which it completed in two to three days (R. 11). And, MRI discharged Davis immediately after completing its investigation—only three (3) days after it first received notice of the alleged conduct of Davis (R. 11). Accordingly, the record shows either that Davis was terminated immediately after MRI became aware of the “offense” (only 3 days after receiving notice of the alleged offense), or that a short delay (of only 3 days) was necessary to accommodate further investigation into Davis' alleged conduct. Therefore, there is no basis in the record for the Board to claim that MRI

failed to establish a proper relationship or nexus in time between the conduct that constituted the alleged cause for discharge and the discharge.

4. The ALJ's/Board's findings did not support the alternate theory

The only factual findings made by the ALJ related to a potential “proximate cause” issue were the following:

The Claimant often took his lunch break in the lunch area where production staff also took their breaks. The Claimant told the staff that he felt there were problems with the way that the company was operated. He did not give specific information about the situation, but mentioned that he believed cash reserves were too low and payroll too high. These discussions occurred approximately twice a week. In late April the president of the company and the human resources manager interviewed several people about the Claimant's comments. They were concerned that some production staff members seemed to have specific information about the company's finances. The Claimant was discharged on May 2, 2008. (R. 95).

In its decision, the Board did not make any “factual findings” per se, but did make the following conclusions related to the issue of “proximate cause” under the heading of “Reasoning and Conclusions of Law”:

The Employer had a comment box and received approximately ten anonymous notes with complaints about the Claimant. The HR manager interviewed four or five people about the Claimant discussing “confidential financial information” and “bad-mouthing” the manner in which the officers were running the company. After interviewing four or five employees, the HR manager decided to let the Claimant go immediately, rather than follow the Employer's progressive discipline policy (R. 129-130).

Finally, the ALJ made the following “conclusions of law” regarding the offense that led to Davis' discharge:

The Employer provided no final incident that led to the Claimant's discharge, but argues that the Claimant habitually “badmouthed” the

company and the management. The Employer further argues that the Claimant was discharged because he revealed confidential financial information about the company to nonmanagement and nonaccounting personnel (R. 97).

None of the factual findings or legal conclusions set forth above support a conclusion that there was a significant delay between MRI's discovery of Davis' conduct in disclosing confidential information and the date of discharge. And, such factual findings and legal conclusions refer to the fact that MRI interviewed several employees about Davis' conduct, and then terminated Davis immediately after concluding such interviews. As was stated above, a short delay prior to discharge is allowable if it was necessary to accommodate further investigation related to the claimant's conduct. *See*, UTAH ADMIN. CODE r.994-405-206(2). Therefore, the Board's theory that there was a lack of relationship in time between the stated cause of discharge and the discharge is not supported by the findings—the findings support the opposite conclusion, namely, that there was no significant delay between MRI's discovery of Davis' offensive conduct and Davis' discharge.

None of the findings of the ALJ or the Board support the Board's argument that there was no nexus between the stated cause of the discharge and the discharge. The Board argues that there was no proximate cause, because MRI did not rely on first hand information in determining that Davis had disclosed confidential financial information of MRI. However, UTAH ADMIN. CODE r.994-405-206(1) states that if “an employer discharged a claimant because of preliminary evidence, but did not obtain ‘proof’ of conduct until after the

separation notice was given, it may still be concluded the discharge was caused by the conduct the employer was investigating.” In this case, it was ultimately proved that Davis improperly disclosed MRI’s confidential financial information. Therefore, there was no lack of proximate cause, even though MRI may have discharged Davis based on preliminary information.

Furthermore, by treating the potential issue of “proximate cause” as a “non-issue” in the manner set forth above (by making no specific rulings about such issue), the ALJ/Board implicitly ruled that MRI satisfied its burden of proof in establishing “proximate cause” between the alleged offense and the discharge.

Finally, the Board argued that MRI did not meet its burden in proving alternate grounds for discharge—as the corollary to the Board’s argument that proximate cause was not established. However, the record would support a “just cause” discharge based on the alternate basis of insubordination concerning the use of profane language. The ALJ made the following factual findings, which were adopted in full by the Board: (1) The accounts receivable clerk heard Davis use profane language; (2) she reported the conduct to management; (3) on January 11, 2008, Davis received a verbal warning not to use profane language in the workplace; (4) Davis continued to use profane language after the warning.


Davis had “knowledge” of the conduct MRI expected, whereas he received a formal warning not to use profane language in the workplace. *See*, UTAH ADMIN. CODE r.994-405-202(2). Davis’ continued use of profane language after he received the warning showed repeated carelessness or unreasonable lack of

care, so “control” over the conduct was established. *See*, UTAH ADMIN. CODE r.994-405-202(3). The fact that Davis repeated the conduct, even though he knew it was offensive to another employee⁸ (and therefore, could adversely affect employee morale) satisfied the “culpability” element of a “just cause” termination. Such conduct was (1) a violation of company policy, (2) which could potentially affect employee morale, and (3) which was likely to be repeated or was not an isolated incident of poor judgment (see previous argument on pp. 9-10).

CONCLUSION

For the foregoing reasons, the Court should reverse the Agency’s decision, which allowed unemployment benefits to Davis.

DATED this 12th day of May, 2009.

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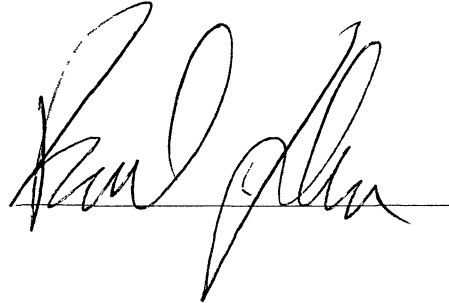
⁸ Davis admitted during his testimony, referring to his co-worker, Amy Sims, that “I’d curse sometimes and, you know, she’d – she’d gasp or something like that. Or she might - she might look at me kind of strangely, or something like that (R. 81, lines 1-6).

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS to be served by First Class U.S. mail, postage prepaid, on this 12th day of May, 2009, to the following:

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A handwritten signature in black ink, appearing to read "Stephen R. Davis", written over a horizontal line.