

1988

# Kevin R. Johnson v. The Utah Industrial Commission Department of Employment Security Coard of Review and Morton Thiokol Inc. : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 880703 IN THE UTAH COURT OF APPEALS

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KEVIN R. JOHNSON,	:	
Claimant/Appellant,	:	BRIEF OF RESPONDENT
	:	MORTON THIOKOL, INC.
v.	:	
THE UTAH INDUSTRIAL COMMISSION	:	NO. 880703-CA
DEPARTMENT OF EMPLOYMENT SECURITY	:	
BOARD OF REVIEW and MORTON	:	
THIOKOL, INC.,	:	
	:	
Respondents.	:	

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BRIEF OF RESPONDENT MORTON THIOKOL, INC.  
PETITION FOR REVIEW OF DECISION OF UTAH INDUSTRIAL COMMISSION  
BOARD OF REVIEW'S DENYING UNEMPLOYMENT BENEFITS  
Case No. 88-A-0368, Decision No. 88-BR-428, December 30, 1988

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Security Board of Review

APR 21 1989

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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KEVIN R. JOHNSON,	:	
Claimant/Appellant,	:	BRIEF OF RESPONDENT
	:	MORTON THIOKOL, INC.
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THE UTAH INDUSTRIAL COMMISSION	:	NO. 880703-CA
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THIOKOL, INC.,	:	
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## I. JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction to review decisions of the Industrial Commission Board of Review ("Board") pursuant to Utah Code Ann. § 63-46b-16.

## II. ISSUE PRESENTED FOR REVIEW

Whether the Board's decision to deny unemployment benefits to an employee who was discharged after testing positive for marijuana on two separate occasions in violation of the employer's written policy was supported by sufficient evidence.

## III. DETERMINATIVE STATUTE

Utah Employment Security Act, Utah Code Ann. Section 35-4-5(b)(1).

Ineligibility for benefits.

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.

#### IV. STATEMENT OF THE CASE

##### A. NATURE OF THE CASE.

Respondent Morton Thiokol, Inc. ("Respondent") incorporates by reference the statement of the Nature of the Case set forth at pages 3 and 4 of the Amicus Curiae Brief of the American Civil Liberties Union except as specifically stated below.

##### B. STATEMENT OF FACTS.

Respondent, Morton Thiokol, Inc., is a private employer with numerous contracts with the Federal Government and Agencies of the Federal Government. Respondent is also widely known as a contractor of rocket boosters for the National Aeronautics and Space Administration's ("NASA") space shuttle program.<sup>1</sup>

Appellant, Kevin R. Johnson, was employed by Respondent as a welder for two-and-one-half years until he was discharged for cause on December 11, 1987. (Claimant's Statement of Reason for Discharge, Record at p. 2.)

Appellant was discharged from his employment after testing positive for marijuana on two separate occasions. (Administrative Law Judge Hearing February 11, 1988, Record at

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<sup>1</sup>These facts are not set forth in the record. However, Respondent asks this Court to take judicial notice of these facts pursuant to Rule 201 of the Utah Rules of Evidence on the ground that these matters are of common and general knowledge within the Court's jurisdiction. See, DeFusion Company v. Utah Liquor Control Commission, 613 P.2d 1120, 1124 (Utah 1980); Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 455-56 (Utah App. 1988).

p. 14.) Appellant was tested for drugs pursuant to a written drug testing policy established by Respondent in July of 1985. (Administrative Law Judge Hearing February 11, 1988, Record at p. 15.) Appellant does not dispute he knew of Respondent's drug testing policy prior to the first test and that he tested positive for an illegal drug, marijuana, on both occasions. (Stipulated to by counsel for Appellant; Administrative Law Judge Hearing October 26, 1988, Record at p. 64.) (Administrative Law Judge Hearing February 11, 1988, Record at p. 20.) It is also undisputed that Respondent's drug testing program and testing of Appellant complied with the requirements of the Utah Drug and Alcohol Testing Act, U.C.A. § 34-38-1 et seq. (attached hereto as Addendum 1).

Appellant admitted to using marijuana prior to the first time he tested positive. (Administrative Law Judge Hearing October 26, 1988, Record at p. 64.) Although Appellant denied using marijuana between the time of the first test (September 21, 1987) and the time of the second test (November 25, 1987), the Board found the Appellant's testimony not credible based on the testimony of Dr. Kerr, Respondent's Medical Director. Dr. Kerr testified that the testing procedures adopted and followed by Respondent were designed to account for the possibility of passive inhalation as well as gradual dissipation of an illegal substance. (Board of Review Decision, Record at p. 88.) Dr. Kerr testified that Respondent's drug testing program includes follow-up testing for marijuana six weeks after the initial

positive test, and that the procedure complied with the recommendation of the Center for Human Toxicology at the University of Utah. (Administrative Law Judge Hearing October 26, 1988, Record at p. 83.) Dr. Kerr also testified that only actual use of marijuana could account for the Appellant testing positive on the second test, and that a test could only be positive for a brief period if it results from extreme exposure<sup>2</sup> to passive inhalation. (Administrative Law Judge Hearing October 26, 1988, Record at p. 80-81.) Dr. Kerr's testimony was unrebutted.<sup>3</sup>

#### V. SUMMARY OF ARGUMENT

This Court must affirm the Board's decision denying Appellant unemployment benefits on the ground that he was

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<sup>2</sup>Extreme exposure was defined as three or four hours of confinement in a small room or car with three to six people heavily smoking marijuana.

<sup>3</sup>Evidence was also solicited from Dr. Ellwood L. Loveridge. Appellant, however, objected to this testimony and the objection was sustained by the Board of Review. (Administrative Law Judge Hearing October 26, 1988, Record at pp. 72-73; Board of Review Decision, Record at p. 87.) The testimony of Dr. Loveridge, even if considered, is not relevant because Dr. Loveridge is not an expert in marijuana testing or research, his offered testimony is based solely on the verbal comments of ten individuals and not on any scientific study, and he has no direct knowledge of the testing of the ten individuals. Appellant and the American Civil Liberties Union ("ACLU") have both attempted in this appeal to introduce evidence from the National Law Journal that is not in the record below. Respondent objects to this Court's consideration of the evidence provided by Dr. Loveridge and the "facts" not found in the record set forth in Appellant's Brief at pp. 13, 14 and 15 and in the ACLU's Brief at p. 25.

discharged for just cause after testing positive on two separate occasions for marijuana because the findings of the Board are supported by the evidence. In order for a claimant to be denied unemployment benefits after being discharged, the evidence must show that the claimant was discharged for "just cause." "Just cause" exists when the claimant's conduct is found to be culpable (meaning that the discharge is necessary to avoid actual or potential harm to the employer's interest), the claimant is found to have control over the conduct leading to the discharge, and the claimant is found to have knowledge that the conduct will result in discharge.

In this case, the evidence establishes that Respondent implemented a drug testing policy in July of 1985 and that Appellant was aware of the drug testing policy before he first tested positive for marijuana on September 21, 1987. The evidence also shows that Respondent's drug testing policy was implemented to protect Respondent, Respondent's employees and the general public from the significant hazards and problems created by the use of drugs. Moreover, the evidence shows that Respondent's drug testing policy complied with specific requirements placed on Respondent, as a government contractor to provide a drug-free workplace, and with the guidelines established by the Utah Drug & Alcohol Testing Act. U.C.A. § 34-38-1. Because the Respondent had legitimate business reasons for implementing a drug testing policy, the Board correctly decided that Appellant's discharge

was necessary in order for Respondent to avoid actual or potential harm.

The other two elements determinative of "just cause" are also clearly established by the evidence. First, if Appellant did in fact smoke marijuana after the first test, he had the power to control his conduct and prevent the second positive test. Even if Appellant's testimony concerning passive inhalation is accepted as true (which the Board did not accept), Appellant had many alternatives available to him and within his power and control to accept in order to avoid being exposed to the marijuana smoking of his roommates. He thus had ability to prevent a second positive test. Finally, Appellant admitted that he knew he could be discharged for testing positive for drugs.

The Board's decision must be affirmed because the evidence presented meets or exceeds the criteria for "just cause" necessary to deny unemployment benefits.

## VI. ARGUMENT

### A. THE BOARD'S DECISION DENYING APPELLANT UNEMPLOYMENT BENEFITS IS SUPPORTED BY THE EVIDENCE.

This Court must affirm the Board's decision unless it determines "it was wrong because only the opposite conclusion could be drawn from the facts." Champlin Petroleum v. Department of Employment Security, 744 P.2d 330, 331 (Utah App. 1987). This Court is bound by the factual findings of the Board "[s]o long as there is evidence of any substance whatever to support the factual

findings . . ." Young v. Board of Review, 731 P.2d 480, 482 (Utah 1986) (emphasis supplied); see also, Board of Education of Sevier County v. Board of Review, 701 P.2d 1064, 1067 (Utah 1985). Additionally, "[t]he mere fact that some evidence is introduced which disputes other evidence does not compel the conclusion that the Board's decision is unsupported by any evidence." Young, supra, 731 P.2d at 482; see also, Terminal Service Co. v. Board of Review, 714 P.2d 298, 299 (Utah 1986).<sup>4</sup>

An individual is ineligible for unemployment benefits when he is "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 interest . . . ." U.C.A. § 35-4-5(b)(1). An individual is terminated for just cause when "his or her culpability, control over the conduct, and knowledge that the conduct will result in termination is shown." Champlin Petroleum, supra, 744 P.2d at 331.

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<sup>4</sup>The ACLU argues at page 10 of its Brief that the factual findings of the Administrative Law Judge should be accorded deference when the findings of the Board conflict. The cases cited by the ACLU do not support such an argument, and, as set forth above, this Court's charge is to determine whether the Board's findings are supported by "evidence of any substance." The position of the ACLU that the findings of the Administrative Law Judge should control directly conflicts with prior Utah case law and the express language of U.C.A. § 35-4-10(d)(2) which gives the Board the right to "affirm, modify, or reverse the findings" of the Administrative Law Judge. See Continental Oil Co. v. Board of Review, 568 P.2d 727, 729 (Utah 1977); and In re License of Topik, 761 P.2d 32, 36 (Utah App. 1988).

1. Appellant's Conduct Evidences Culpability.

The Industrial Commission's administrative rule for determining "just cause" provides the following explanation of "culpability."

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 affects the employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

Unemployment Insurance Rule 35-4-5(b)(1) para B1 (1986).

All employers and employees, including Respondent and Respondent's employees, are entitled to a drug-free workplace not only because of the significant safety hazard that drug use creates, but also because of the tremendous loss of human and monetary resources that results from drugs. Respondent recognized these concerns and acted to protect itself, its employees, and the general public by implementing a written drug and alcohol testing program in July of 1985.

The Utah Legislature, because of similar concerns, made formal findings and enacted the Drug and Alcohol Testing Act. That Act states:

The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and decline in the quality of products and services.

U.C.A. § 34-38-1. Respondent instituted its drug and alcohol testing program to protect legitimate interests and to avoid the actual and potential harms resulting from the use of illegal drugs as identified by the Legislature.

Respondent not only has the concerns reflected by the Legislature's findings, but as a government contractor of highly sophisticated national defense products, it must comply with special regulations promulgated by the United States Department of Defense governing federal contractors concerning drugs in the workplace. On September 28, 1988, the Department of Defense issued an Interim Rule addressing drugs in the workplace. 53 Fed. Reg. 37,763, attached hereto as Addendum 2.<sup>5</sup> The Interim Rule articulates the Defense Department policy that defense contractors

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<sup>5</sup>On October 21, 1988 Congress passed the Drug-Free Workplace Act of 1988, Public Law 100-690. This Act was signed into law by President Reagan on November 18, 1988, and became effective on March 18, 1989.

shall maintain a program for achieving a drug-free workplace, and adopts the following findings:

(a) The use of illegal drugs, on or off duty, is inconsistent with law-abiding behavior expected of all citizens. Employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism resulting in the potential for increased cost, delay, and risk to the government contract.

(b) The use of illegal drugs, on or off duty, by employees can impair the ability of those employees to perform tasks that are critical to proper contract performance and can also result in the potential for accidents on duty and for failures that can pose a serious threat to national security, health, and safety.

(c) The use of illegal drugs, on or off duty, by employees in certain positions can result in less than the complete reliability, stability, and good judgment that are consistent with access to sensitive information. Use of illegal drugs also creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, and health and safety.

Based on these findings, the Department of Defense mandates that in certain contracts with the Department of Defense, including contracts with Respondent, the contractor shall institute and maintain a program for achieving a drug-free work force.

Respondent, as an employer and in particular a government contractor, has a rightful and reasonable interest in a drug-free environment and it must implement a written drug and alcohol testing program to promote such an environment. Appellant

contends that culpability may be found only if there is actual job impairment; this position, however, contradicts the clear language of Section 35-4-5(b)(1) of the Utah Employment Security Act and the Industrial Commission's administrative rules as well as prior case law. The Court need only find that the discharge is necessary to avoid actual or potential harm and is consistent with reasonable business practice. Respondent's written drug testing policy together with the strong policy statements and requirements of the Utah Legislature and the United States Department of Defense evidence Respondent's reasonable right to maintain and expect a work environment that is free from the innumerable problems (actual or potential) created by the use of drugs and alcohol. Thus, this Court must find that the Board's decision with regard to the element of "culpability" is supported by the facts.

2. Appellant's Conduct Was Within His Power and Capacity to Control or Prevent.

The Industrial Commission's administrative rule for determining "just cause" contains the following explanation of "control".

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

Unemployment Insurance Rule 35-4-5(b)(1) para B1 (1986).

The Board chose to disregard Appellant's stated denial of marijuana use after the first test, and instead, relied upon the testimony of Dr. Kerr. He testified that Respondent's testing

program incorporated procedures to eliminate both passive inhalation and gradual dissipation of marijuana as causes for Appellant's second positive test. (Board of Review Decision, Record at p. 87) The law is well settled that conflicting evidence does not compel the conclusion that the Board's decision is not supported by any evidence. See Young v. Board of Review, 731 P.2d 480, 482 (Utah 1986); Terminal Service Co. v. Board of Review, 714 P.2d 298, 299 (Utah 1986).

In this case, sufficient evidence supports the Board's decision. First, the Appellant admitted prior use of marijuana. Second, the unrebutted testimony of Dr. Kerr established that Respondent's testing program allowed for follow-up testing six weeks after a positive test. The testing program resulted from Dr. Kerr's consultation with the Center for Human Toxicology at the University of Utah. Third, Dr. Kerr's unrebutted testimony established that only extreme exposure to passive inhalation, such as confinement in a car or small room for three or four hours with three to six people heavily smoking marijuana, could result in a positive test from passive inhalation. Dr. Kerr further testified that for a positive test to result from passive inhalation, a test must be administered shortly after the extreme exposure. Since the Board decided to disregard the Appellant's testimony denying his marijuana use after the first positive test, this Court must accept that finding, and conclude

that there was substantial evidence that the Appellant had the ability to control his conduct.

Even if the Board believed Appellant's testimony concerning passive inhalation, the evidence establishes that Appellant retained the capacity to prevent passive inhalation. Appellant claimed his roommates were constantly smoking marijuana in his apartment. Notwithstanding Appellant's conduct in allowing his roommates to criminally use and possess marijuana, as the Board alluded to in its Decision at pages 89-90,<sup>6</sup> Appellant failed to either curtail further use by his roommates in the apartment or to completely remove himself from the apartment. Numerous alternative avenues within his power and control were available to prevent passive inhalation. First, Appellant could have reported the conduct of his roommates to the landlord and sought his assistance in curbing their illegal activities. Second, he could have acted to avoid criminal prosecution and reported the conduct to the police. Third, Appellant could have found a new place to live or moved in with a friend until the end of his lease. Each of these alternatives was readily available to Appellant, and each would have allowed Appellant to avoid the

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<sup>6</sup>Appellant's actions appear to be a clear violaton of Utah Code Ann. § 58-37-8 (attached hereto as Addendum 3).

perceived risk of testing positive for marijuana from passive inhalation.<sup>7</sup>

The Court therefore must find that the Board's decision concerning "control" is supported by the evidence because Appellant clearly had the power and capacity to prevent testing positive for marijuana.

3. Appellant Clearly Acted with Knowledge.

The Industrial Commission's administrative rule for determining "just cause" contains the following explanation of "knowledge."

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

Unemployment Insurance Rule 35-4-5(b)(1) para. B1 (1986).

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<sup>7</sup>Further, Appellant submitted no evidence as to any differences regarding the actual or potential harmful effect of marijuana residue in the body's system stemming from passive as opposed to direct inhalation.

At page 9 of Appellant's Brief, Appellant "concedes that he knew that the presence of marijuana in his system would likely result in termination. . . ." Appellant's concession recognizes Respondent's establishment of a written drug testing policy in 1985, and reflects his awareness of that program prior to the first time he tested positive for marijuana.<sup>8</sup> The depth of his awareness was reinforced by his conduct after the second test. At the hearing before the Administrative Law Judge, Respondent's Employee Relations Area Representative testified that after the second test had been performed, but before the results were made available, Appellant telephoned to express his concerns over a second positive test and an "explanation" as to why he might test positive. Appellant stated his roommates smoked marijuana and he was afraid of passive inhalation. (Administrative Law Judge hearing February 11, 1988, Record at p. 16.)

The admissions of Appellant and the other evidence before the Board established that Respondent had a written drug testing policy, that Appellant knew testing positive for marijuana could result in termination, and that, in addition, Appellant believed passive inhalation could cause a positive test result possibly

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<sup>8</sup>Appellant certified under penalty of law on the Claimant Statement of Reason for Discharge (Record at p. 2) that he was aware of the drug and alcohol testing policy, that he received a written warning on October 7, 1987, for a previous violation of the policy, and that he was informed that a second violation would result in his discharge.

resulting in termination. Based on these facts, this Court must find that the Board's decision with regard to the Appellant's "knowledge" is supported by the record.

B. THE BOARD'S DECISION IN THIS CASE IS CONSISTENT WITH PRIOR DECISIONS OF THE UTAH SUPREME COURT AND THE UTAH COURT OF APPEALS.

Appellant claims that the Board's decision in this case is inconsistent with this Court's decision in Champlin Petroleum, supra. The Champlin Petroleum decision is readily distinguishable from this case. There, the claimant was discharged after the employer received a medical discharge report indicating that the claimant's mental illness and breakdown might have been exacerbated from the claimant's intermittent use of and withdrawal from marijuana. The employer did not have a policy against drug use by employees, and the employer performed no drug testing prior to terminating the claimant. Id. at 332. Further, the claimant there was terminated because he was unable to return to work without limitation, not because of any mental problems or drug-related conduct. Id. at 331. Based on those facts, the Administrative Law Judge, whose findings and conclusions were adopted in full by the Board, concluded that neither the control nor the culpability factors supported a finding of just cause. On appeal, this Court affirmed the administrative decision, concluding that it was "well within the bounds of reason and rationality for the Board to conclude: "(1) that [claimant's]

mental illness was not sufficiently within his control; and (2) that any exacerbation of his mental problems from his use of marijuana did not rise to the level of fault essential to establish just cause and deny him his unemployment benefits." Id. at 332-33. Champlin Petroleum does not stand for the proposition, as asserted by Appellant, that in order to justify the denial of unemployment benefits, the conduct must have been committed on the job or must have impacted job performance.<sup>9</sup>

Not only is the decision in Champlin Petroleum distinguishable from the case at hand, but the issues here are almost identical to those in Western Dairymen Cooperative, Inc. v. Board of Review, 684 P.2d 647 (Utah 1984). In Western Dairymen the operator of a cheese factory appealed an order of the Board granting unemployment benefits to employees who refused to comply with the operator's grooming policy prohibiting employees from wearing beards or mustaches. Although the Board in that case did not determine whether the grooming policy had a valid business purpose, the Court found that the policy was intended to improve sanitary conditions, and that it was not an extreme or

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<sup>9</sup>Requiring an employer to show "actual" impact on job performance would be contrary to the clear language of the Utah Employment Security Act, U.C.A. § 35-4-5(b)(1) (which only requires conduct "adverse to the employer's interest") and the Unemployment Insurance Rule 35-4-5(b)(1) ¶ B1 (1986) (which provides that the discharge must be necessary to avoid actual or potential harm).

unreasonable measure. In reversing the decision of the Board, the Utah Supreme Court held that employers have the right to formulate rules furthering the employer's legitimate business interests. The most important factor in determining the reasonableness of a business purpose focuses on whether it advances the employer's interest as opposed to being a condition of employment unrelated to actual job needs or performance. Id. at 649. Application of that factor set forth by the Supreme Court in Western Dairymen to the facts of this case compels a finding that the Respondent's drug testing policy furthers legitimate business interests.

The Utah Supreme Court has also held that the actionable misconduct is not necessarily limited to conduct occurring during the hours of employment and on the employer's premises.

Clearfield City v. Department of Employment Security, 663 P.2d 440, 443 (Utah 1983). In Clearfield City, the Court reversed the decision of the Board and held that a police officer, fired for engaging in off-duty sodomy, was not entitled to receive unemployment benefits. Off-duty conduct continues to be a relevant consideration in determining whether employee misconduct affects legitimate business interests of the employer.

In summary, as discussed above, sustaining the Board's decision in this case will be consistent with precedents of the Utah Supreme Court and the Utah Court of Appeals.

C. TO ALLOW APPELLANT TO RECOVER UNEMPLOYMENT BENEFITS AFTER TESTING POSITIVE FOR MARIJUANA ON TWO SEPARATE OCCASIONS WOULD FRUSTRATE LEGISLATIVE INTENT.

The Utah Employment Security Act was enacted to protect the public from the economic insecurity created by unemployment resulting from conduct over which the employee has no control. It was not enacted to allow employees to receive benefits for engaging in conduct that is adverse to the interests of the employer, co-employees, or the general public. Appellant should not be permitted to benefit from conduct that is against Respondent's and the general public's interests by receiving unemployment benefits.<sup>10</sup>

The State Legislature enacted the Drug and Alcohol Testing Act not only to provide guidelines for employers who implement testing for drugs and alcohol, but to also protect them from any direct actions by employees resulting from drug and alcohol testing provided that the employer's program complies with the Act. U.C.A. § 34-38-1 et seq. To allow a discharged employee to recover unemployment benefits after being terminated for

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<sup>10</sup>Not only will granting unemployment benefits to persons discharged as a result of testing positive for drugs impede employers and society from correcting drug-related workplace problems, it would distort the entire thrust of the State's Employment Security Act. For example, it may encourage some employees to use their consumption of alcohol and drugs to manipulate the system so as to allow them to be "fired" from their employment and to then receive unemployment benefits while they pursue other activities. This Court should not sanction such conduct and should not reward those who test positive for drugs.

testing positive for drugs would allow the employee to do indirectly what he or she cannot do directly, i.e., recover money after being discharged for testing positive for drugs. Such a result would frustrate the legislative intent of the Utah Drug and Alcohol Testing Act, and would disregard public policy concerns that led to the creation and implementation of drug testing policies and legislation. In effect, the employee would receive unemployment compensation for criminal acts.

D. APPELLANT SHOULD NOT BE ALLOWED TO RAISE NEW ISSUES ON APPEAL.

Appellant and the ACLU have raised two constitutional issues that were not raised below: equal protection and substantive due process. Utah courts have consistently and strongly opposed the raising of issues for the first time on appeal. See, e.g., Lane v. Messer, 731 P.2d 488, 491 (Utah 1986); Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 456 (Utah App. 1988). The general rule followed by Utah courts is well recognized by courts of other jurisdictions, and is based on the ground that courts of appeal do not have the power to review decisions of lower courts for errors that were not raised below. 5 Am. Jur. 2d, Appeal and Error, § 545. This general rule applies equally when constitutional issues are first raised on appeal, except where a person's liberty may be at stake. See, e.g., Pratt v. City Council of the City of Riverton, 639 P.2d 172, 173-74 (Utah 1981). Although Utah courts have not addressed the applicability of this

rule in reviewing an administrative agency's decision, courts of other states have applied this rule. See, e.g., Lewis v. Anaconda Company, 543 P.2d 1339, 1342 (Mt. 1975) (claimant could not raise constitutional issue of due process for the first time on appeal, and court did not therefore consider it.); Smith v. Workmen's Compensation Appeal Board, 396 A.2d 905, 906 n.1 (Pa. 1979). Based on the general rule, Respondent submits that the Appellant and the ACLU may not raise new issues concerning equal protection and substantive due process.

E. THE ISSUES IN THIS CASE CAN BE RESOLVED WITHOUT ADDRESSING THE CONSTITUTIONAL CLAIMS FIRST RAISED BY APPELLANT AND THE ACLU ON APPEAL.

"It is a fundamental rule that this Court should avoid addressing constitutional issues unless required to do so." State v. Anderson, 701 P.2d 1099, 1103 (Utah 1985). If this Court can decide the issues without addressing the constitutional claims raised for the first time on appeal by Appellant and the ACLU, the Court should do so. See, e.g., Goodsel v. Department of Business Regulation, 523 P.2d 1230, 1232 (Utah 1974); Clinton City v. Patterson, 433 P.2d 7, 9 (Utah 1967). This case involves only the issue of whether the Appellant was discharged for just cause as that term is defined by U.C.A. § 35-4-5(b)(1). Resolution of this issue does not require any constitutional analysis. Accordingly, even if this Court were to conclude that the constitutional issues can be raised for the first time on appeal, this Court should

avoid addressing them because the resolution of the constitutional claims is unnecessary to decide the issue of whether Appellant was justly discharged.<sup>11</sup>

## VII. CONCLUSION

The Board of Review decision denying unemployment benefits to Appellant after he was discharged for testing positive

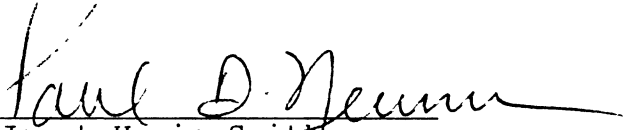
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<sup>11</sup>Even if this Court decides that the constitutional issues can be raised for the first time on appeal, it is clear that the ACLU's and the Appellant's arguments in this regard are without merit. First, the ACLU erroneously claims that if this Court upholds the denial of unemployment benefits based on positive drug tests, such a determination would be unconstitutional because there was no showing that Appellant's job performance was impaired. That contention incorrectly analyzes the language of the statute, implementing rules and prior cases. As set forth in detail above, the sole issue in this case is whether the claimant was discharged for "just cause" as defined by the Utah Employment Security Act; U.C.A. § 35-4-5(b)(1) and Unemployment Insurance Rule 35-4-5(b)(1), ¶ B1 (1986), and resolution of this issue requires no constitutional analysis. Second, the Appellant incorrectly asserts that the Utah Drug and Alcohol Testing Act is unconstitutional because it creates different classes of employers and employees. The Act allows, but does not require, private employers to implement drug and alcohol testing procedures pursuant to certain guidelines. It does not prevent public employers from implementing drug and alcohol testing policies. As a result, even if such a constitutional argument were relevant to the questions in this case, the Act does not create different classes of employers and employees. See, Mountain Fuel Supply Company v. Salt Lake City Corporation, 752 P.2d 884 (Utah 1988).

for marijuana on two separate occasions is supported by substantial evidence, and should be affirmed by this Court.

Dated this 21<sup>ST</sup> day of April, 1989.

RAY, QUINNEY & NEBEKER

A handwritten signature in cursive script, appearing to read "Paul D. Newman", written over a horizontal line.

Janet Hugie Smith

Larry G. Moore

Paul D. Newman

Attorneys for Respondent  
Morton Thiokol, Inc.

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PROOF OF SERVICE

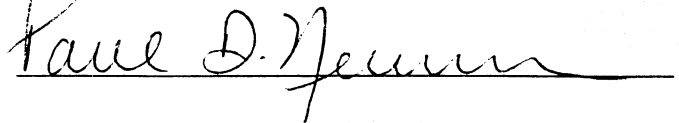
The undersigned, attorney for Respondent Morton Thiokol, Inc., hereby certifies that on April 21<sup>ST</sup>, 1989, he caused to be served the foregoing Respondent's Brief on all parties to this Appeal by mailing four (4) copies thereof by first-class mail, postage prepaid, addressed to their attorneys as follows:

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DATED this 21<sup>ST</sup> day of April, 1989.



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VIII. ADDENDA

- Addendum 1        Utah Drug and Alcohol Testing Act,  
                      U.C.A. § 34-38-1, et seq.
- Addendum 2        Department of Defense Interim Rule,  
                      53 Fed. Reg. 37,763
- Addendum 3        Utah Code Annotated, § 58-37-8

ADDENDUM 1

Utah Drug and Alcohol Testing Act,  
U.C.A. § 34-38-1, et seq.

## CHAPTER 38

### DRUG AND ALCOHOL TESTING

Section		Section	
34-38-1.	Legislative findings — Purpose and intent of chapter.		or problem, or for termination of testing program.
34-38-2.	Definitions.	34-38-10.	No cause of action arises against employer unless false test result — Presumption and limitation of damages in claim against employer.
34-38-3.	Testing for drugs or alcohol.	34-38-11.	Bases for cause of action for defamation, libel, slander, or damage to reputation.
34-38-4.	Samples — Identification and collection.	34-38-12.	No cause of action arises based on failure of employer to establish testing program.
34-38-5.	Time of testing — Cost of testing and transportation.	34-38-13.	Confidentiality of information.
34-38-6.	Requirements for collection and testing.	34-38-14.	Employee not "handicapped."
34-38-7.	Employer's written testing policy — Purposes and requirements for collection and testing — Employer's use of test results.	34-38-15.	No physician-patient relationship created.
34-38-8.	Employer's disciplinary or rehabilitative actions.		
34-38-9.	No cause of action arises for failure to test or detect substance		

#### **34-38-1. Legislative findings — Purpose and intent of chapter.**

The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees, and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

Therefore, in balancing the interests of employers, employees, and the welfare of the general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this chapter, is in the best interest of all parties.

The Legislature does not intend to prohibit any employee from seeking damages or job reinstatement, if action was taken by his employer based on a false drug or alcohol test result.

History: C. 1953, 34-38-1, enacted by L. 1987, ch. 234, § 1.

### **34-38-2. Definitions.**

For purposes of this chapter:

- (1) "Alcohol" means ethyl alcohol or ethanol.
- (2) "Drugs" means any substance recognized as a drug in the United States Pharmacopeia, the National Formulary, the Homeopathic Pharmacopeia, or other drug compendia, or supplement to any of those compendia.
- (3) "Employer" means any person, firm, or corporation, including any public utility or transit district, which has one or more workers or operators employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written. "Employer" does not include the federal or state government, or other local political subdivisions.
- (4) "Employee" means any person in the service of an employer, as defined by Subsection (3), for compensation.
- (5) "Prospective employee" means any person who has made application to an employer, whether written or oral, to become his employee.
- (6) "Sample" means urine, blood, breath, saliva, or hair.

History: C. 1953, 34-38-2, enacted by L. 1987, ch. 234, § 2.

### **34-38-3. Testing for drugs or alcohol.**

It is not unlawful for an employer to test employees or prospective employees for the presence of drugs or alcohol, in accordance with the provisions of this chapter, as a condition of hiring or continued employment. However, employers and management in general must submit to the testing themselves on a periodic basis.

History: C. 1953, 34-38-3, enacted by L. 1987, ch. 234, § 3.

### **34-38-4. Samples — Identification and collection.**

In order to test reliably for the presence of drugs or alcohol, an employer may require samples from his employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples. Collection of the sample shall be in conformance with the requirements of Section 34-38-6. The employer may designate the type of sample to be used for testing.

History: C. 1953, 34-38-4, enacted by L. 1987, ch. 234, § 4.

### **34-38-5. Time of testing — Cost of testing and transportation.**

(1) Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.

(2) An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a place other than the workplace.

History: C. 1953, 34-38-5, enacted by L. 1987, ch. 234, § 5.

### **34-38-6. Requirements for collection and testing.**

All sample collection and testing for drugs and alcohol under this chapter shall be performed in accordance with the following conditions:

(1) The collection of samples shall be performed under reasonable and sanitary conditions;

(2) Samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

(3) Sample collection shall be documented, and the documentation procedures shall include:

(a) labeling of samples so as reasonably to preclude the probability of erroneous identification of test results; and

(b) an opportunity for the employee or prospective employee to provide notification of any information which he considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs, or other relevant medical information.

(4) Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration; and

(5) Sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method, before the result of any test may be used as a basis for any action by an employer under Section 34-38-8.

History: C. 1953, 34-38-6, enacted by L. 1987, ch. 234, § 6.

**34-38-7. Employer's written testing policy — Purposes and requirements for collection and testing — Employer's use of test results.**

(1) Testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to employees and is available for review by prospective employees.

(2) Within the terms of his written policy, an employer may require the collection and testing of samples for the following purposes:

- (a) investigation of possible individual employee impairment;
- (b) investigation of accidents in the workplace or incidents of workplace theft;
- (c) maintenance of safety for employees or the general public; or
- (d) maintenance of productivity, quality of products or services, or security of property or information.

(3) The collection and testing of samples shall be conducted in accordance with Sections 34-38-4, 34-38-5, and 34-38-6, and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.

(4) The employer's use and disposition of all drug or alcohol test results are subject to the limitations of Sections 34-38-8 and 34-38-13.

**History:** C. 1953, 34-38-7, enacted by L. 1987, ch. 234, § 7.

**34-38-8. Employer's disciplinary or rehabilitative actions.**

Upon receipt of a verified or confirmed positive drug or alcohol test result which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a sample, an employer may use that test result or refusal as the basis for disciplinary or rehabilitative actions, which may include the following:

- (1) a requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;
- (2) suspension of the employee with or without pay for a period of time;
- (3) termination of employment;
- (4) refusal to hire a prospective employee; or
- (5) other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

**History:** C. 1953, 34-38-8, enacted by L. 1987, ch. 234, § 8.

**Cross-References.** — State alcoholism and drug rehabilitative services, § 63-43-3.

**34-38-9. No cause of action arises for failure to test or detect substance or problem, or for termination of testing program.**

No cause of action arises in favor of any person against an employer who has established a policy and initiated a testing program in accordance with this chapter, for any of the following:

- (1) failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;
- (2) failure to test for, or if tested for, failure to detect, any specific drug or other substance, disease, infectious agent, virus, or other physical abnormality, problem, or defect of any kind; or
- (3) termination or suspension of any drug or alcohol testing program or policy.

**History:** C. 1953, 34-38-9, enacted by L.  
1987, ch. 234, § 9.

**34-38-10. No cause of action arises against employer unless false test result — Presumption and limitation of damages in claim against employer.**

- (1) No cause of action arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this chapter, and who has taken any action under Section 34-38-8, unless the employer's action was based on a false test result.
- (2) In any claim, including a claim under Section 34-38-11, where it is alleged that an employer's action was based on a false test result:
  - (a) there is a rebuttable presumption that the test result was valid if the employer complied with the provisions of Section 34-38-6; and
  - (b) the employer is not liable for monetary damages if his reliance on a false test result was reasonable and in good faith.

**History:** C. 1953, 34-38-10, enacted by L.  
1987, ch. 234, § 10.

**34-38-11. Bases for cause of action for defamation, libel, slander, or damage to reputation.**

No cause of action for defamation of character, libel, slander, or damage to reputation arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this chapter, unless:

- (1) the results of that test were disclosed to any person other than the employer, an authorized employee or agent of the employer, the tested employee, or the tested prospective employee;
- (2) the information disclosed was based on a false test result;
- (3) the false test result was disclosed with malice; and
- (4) all elements of an action for defamation of character, libel, slander, or damage to reputation as established by statute or common law, are satisfied.

**History:** C. 1953, 34-38-12, enacted by L.  
1987, ch. 234, § 12.

**34-38-12. No cause of action arises based on failure of employer to establish testing program.**

No cause of action arises in favor of any person based upon the failure of an employer to establish a program or policy of drug or alcohol testing.

History: C. 1953, 34-38-12, enacted by L. 1987, ch. 234, § 12.

**34-38-13. Confidentiality of information.**

(1) All information, interviews, reports, statements, memoranda, or test results received by the employer through his drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding related to an action taken by an employer under Section 34-38-8 or an action under Section 34-38-11.

(2) The information described in Subsection (1) shall be the property of the employer.

(3) An employer is entitled to use a drug or alcohol test result as a basis for action under Section 34-38-8.

(4) An employer may not be examined as a witness with regard to the information described in Subsection (1), except in a proceeding related to an action taken by the employer under Section 34-38-8 or an action under Section 34-38-11.

History: C. 1953, 34-38-13, enacted by L. 1987, ch. 234, § 13.

**34-38-14. Employee not "handicapped."**

An employee or prospective employee whose drug or alcohol test results are verified or confirmed as positive in accordance with the provisions of this chapter shall not, by virtue of those results alone, be defined as a person with a "handicap" for purposes of Chapter 35, Title 34, the Utah Anti-Discrimination Act.

History: C. 1953, 34-38-14, enacted by L. 1987, ch. 234, § 14.

**34-38-15. No physician-patient relationship created.**

A physician-patient relationship is not created between an employee or prospective employee, and the employer or any person performing the test, solely by the establishment of a drug or alcohol testing program in the workplace.

History: C. 1953, 34-38-15, enacted by L. 1987, ch. 234, § 15.

**Severability Clauses.** — Laws 1987, ch. 244, § 16 provided that if any provision of that

chapter or the application of any provision to any person or circumstance, is held invalid, the remainder of the chapter is given effect without the invalid provision or application.

ADDENDUM 2

Department of Defense Interim Rule,  
53 Fed. Reg. 37,763

# INTERIM DEFENSE DEPARTMENT REGULATIONS GOVERNING DRUG FREE WORKPLACE PROGRAMS FOR CONTRACTORS

## PART 223—ENVIRONMENT, CONSERVATION AND OCCUPATIONAL SAFETY

2. A new Subpart 223.75, consisting of sections 223.7500 through 223.7504, is added to read as follows:

### Subpart 223.75—Drug-Free Work Force

Sec.	
223.7500	Scope of subpart.
223.7501	Policy.
223.7502	Definitions.
223.7503	General.
223.7504	Contract clause.

### Subpart 223.75—Drug-Free Work Force

#### 223.7500 Scope of subpart.

This subpart prescribes policies and procedures concerning drug abuse as it impacts on the performance of defense contracts. Departments may establish special procedures as they determine necessary to satisfy their mission requirements.

#### 223.7501 Policy.

It is the policy of the Department of Defense that defense contractors shall maintain a program for achieving a drug-free work force.

#### 223.7502 Definitions.

"Illegal drugs," as used in this subpart, means controlled substances included in Schedule I and II, as defined by section 802(8) of Title 21 of the United States Code, the possession of which is unlawful under Chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

"Employee in a sensitive position," as used in this subpart, means an employee who has been granted access to classified information; or employees in other positions that the contractor determines involve National Security, health or safety, or functions other than the foregoing requiring a high degree of trust and confidence.

#### 223.7503 General.

(a) The use of illegal drugs, on or off duty, is inconsistent with law-abiding behavior expected of all citizens. Employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism resulting in the potential for increased cost, delay, and risk to the government contract.

(b) The use of illegal drugs, on or off duty, by employees can impair the ability of those employees to perform tasks that are critical to proper contract performance and can also result in the potential for accidents on duty and for failures that can pose a serious threat to national security, health, and safety.

(c) The use of illegal drugs, on or off duty, by employees in certain positions can result in less than the complete reliability, stability, and good judgment that are consistent with access to sensitive information. Use of illegal drugs also creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, and health and safety.

#### 223.7504 Contract clause.

The contracting officer shall insert the clause at 252.223-7500 in all solicitations and contracts that meet the following criteria:

(a) All contracts involving access to classified information;

(b) Any other contract when the contracting officer determines that inclusion of the clause is necessary for reasons of national security or for the purpose of protecting the health or safety of those using or affected by the product of or the performance of the contract (except for commercial or commercial-type products (see FAR 11.001)).

(c) This clause does not apply to a contract, or to that part of a contract, that is to be performed outside of the United States, its territories, and possessions, except as otherwise determined by the contracting officer.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Section 252.223-7500 is added to read as follows:

### 252.223-7500 Drug-free work force.

As prescribed in 223.7504, insert the following clause:

#### Drug-Free Work Force (Sep 1988)

(a) Definitions. "Illegal drugs," as used in this clause, means controlled substances included in Schedule I and II, as defined by section 802(8) of Title 21 of the United States Code, the possession of which is unlawful under Chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

"Employee in a sensitive position," as used in this clause, means an employee who has been granted access to classified information; or employees in other positions that the contractor determines involve national security, health or safety, or functions other than the foregoing requiring a high degree of trust and confidence.

(b) The Contractor agrees to institute and maintain a program for achieving the objective of a drug-free work force. While this clause defines criteria for such a program, Contractors are encouraged to implement alternative approaches comparable to the criteria in paragraph (c) below that are designed to achieve the objectives of this clause.

(c) Contractor programs shall include the following, or appropriate alternatives:

(1) Employee assistance programs emphasizing high level direction, education, counseling, rehabilitation, and coordination with available community resources;

(2) Supervisory training to assist in identifying and addressing illegal drug use by Contractor employees;

(3) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues;

(4) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis. Employee drug testing programs shall be established taking account of the following:

(i) The Contractor shall establish a program that provides for testing for the use of illegal drugs by employees in sensitive positions. The extent of and criteria for such testing shall be determined by the Contractor based on considerations that include the nature of the work being performed under the contract, the employee's duties, the efficient use of Contractor resources, and the risks to public health, safety, national security that could result from the failure of an employee adequately to discharge his or her position.

(ii) In addition, the Contractor may establish a program for employee drug testing—

(A) When there is a reasonable suspicion that an employee uses illegal drugs; or

(B) When a employee has been involved in an accident or unsafe practice;

(C) As part of or as a follow-up to counseling or rehabilitation for illegal drug use;

(D) As part of a voluntary employee drug testing program.

(iii) The Contractor may establish a program to test applicants for employment for illegal drug use.

(iv) For the purpose of administering this clause, testing for illegal drugs may be limited to those substances for which testing is prescribed by section 2.1 of Subpart B of the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," (53 FR 11980 (April 11, 1988)), issued by the Department of Health and Human Services.

(d) Contractors shall adopt appropriate

personnel procedures to deal with employees who are found to be using drugs illegally. Contractors shall not allow any employee to remain on duty or perform in a sensitive position who is found to use illegal drugs until such time as the contractor, in accordance with procedures established by

the contractor, determines that the employee may perform in such a position.

(e) The provisions of this clause pertaining to drug testing programs shall not apply to the extent they are inconsistent with state or local law, or with an existing collective

bargaining agreement; provided that with respect to the latter, the Contractor agrees that those issues that are in conflict will be a subject of negotiation at the next collective bargaining session.  
(End of clause)

-- End of Text --

-- End of Section E --

ADDENDUM 3

Utah Code Annotated, § 58-37-8

### **58-37-8. Prohibited acts — Penalties.**

**(1) Prohibited acts A — Penalties:**

**(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:**

**(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;**

**(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;**

**(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances**

listed in Schedules II through V except under an order or prescription;

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating Subsection (1) (a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marihuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order or directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place, knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence shows that he did not use the substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;

(iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;

(v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent required in Section 78-14-5 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency; for purposes of this subsection, a juvenile means a "child" as defined in Subsection 78-3a-2(3), and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;

(vi) for a practitioner licensed under this chapter knowingly and intentionally to prescribe or administer dosages of a controlled substance in excess of medically recognized quantities necessary to treat the ailment, malady, or condition of the ultimate user; or

(vii) for any person to prescribe, administer, or dispense any controlled substance to another person knowing that the other person is using a false name, address, or other personal information for the purpose of securing the same.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marihuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, or marihuana, if the amount is more than 16 ounces, but less than 100 pounds, is guilty of a third degree felony; or

(iii) marihuana, if the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a second or subsequent conviction of possession of any controlled substance by a person previously convicted under Subsection (2)(b), that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marihuana, is guilty of a class B misdemeanor. Upon a second conviction for possession of a controlled substance as provided in this subsection, the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction he is guilty of a third degree felony.

(e) Any person convicted of violating Subsections (2)(a)(ii) through (2)(a)(vii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor;

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

(ii) who is a licensee to manufacture, distribute, or dispense a controlled substance to another licensee or other authorized person not authorized by his license;

(iii) to omit, remove, alter, or obliterate a symbol required by this chapter or by a rule issued under this chapter;

(iv) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter; or

(v) to refuse entry into any premises for inspection as authorized by this chapter.

(b) Any person convicted of violating Subsection (3)(a) shall be punished by a civil penalty of not more than \$5,000. The proceedings are independent of, and not in lieu of, criminal proceedings under this chapter or any other law of this state. If the violation is prosecuted by information or indictment which alleges the violation was committed knowingly or intentionally, that person is upon conviction guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, or to prescribe or dispense to any person known to be attempting to acquire or obtain possession of or procure the administration of, any controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter, or to willfully make any false statement in any prescription, order, report, or record required by this chapter; or

(v) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (4)(a) is guilty of a third degree felony.

(5) Prohibited acts E — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Chapter 37a, Title 58, the Drug Paraphernalia Act, or under Chapter 37b, Title 58, the Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school under Subsection (5)(a)(i);

(iii) within 1,000 feet of any structure, facility, or grounds included in Subsection (5)(a)(i) or (ii); or

(iv) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, nor is the person eligible for parole until

the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense, or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

(6) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(7) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) (a) When it appears to the court at the time of sentencing any person convicted under this chapter that the person has previously been convicted of an offense under the laws of this state, the United States, or another state, which if committed in this state would be an offense within this chapter and it appears that probation would not be of benefit to the defendant or that probation would be contrary to the interest, welfare, or protection of society, the court, notwithstanding Section 77-35-20, may, if there is compliance with Subsection (9)(b), impose a minimum term to be served by the defendant, of up to  $\frac{1}{2}$  the maximum sentence imposed by law for the offense committed.

(b) (i) Before any person may be sentenced to a minimum term as provided in Subsection (9)(a), the prosecuting attorney, or grand jury if an indictment, shall cause to be subscribed upon the complaint, in misdemeanor cases, or the information or indictment, in addition to the substantive offense charged, a statement setting forth the alleged past conviction of the defendant and specifically stating the date and place of conviction and the offense of which the defendant was convicted. The allegation shall be presented to the defendant at the time of his arraignment, or afterwards by leave of court, but in no event later than two days prior to the trial of the offense charged or the defendant's entering a plea of guilty. At the time of arraignment or a later date when granted by the court, the court shall read the allegation of the previous conviction to the defendant, provide him or his counsel with a copy of it, and explain to the defendant the consequences of the allegation under Subsection (9)(a). The allegation of the past conviction of the defendant is not admissible in a jury trial, except where the admissibility in evidence of a previous conviction is otherwise recognized as admissible by law.

(ii) The court, following conviction of the defendant of the substantive offense charged and prior to imposing sentence, shall inform the defendant of its decision to impose a minimum sentence under Subsection (9)(a) and inquire as to whether the defendant admits or denies the previous conviction. If the defendant denies the previous conviction, the court shall afford him an opportunity to present evidence showing that the allegation of the past conviction is erroneous or the conviction was lawfully vacated or the defendant was pardoned. The evidence shall be made a matter of record. Following the evidence the court shall make a finding as to whether the defendant has a previous conviction, which finding is final, except for a showing of abuse of discretion. Following the findings by the court the defendant shall be sentenced under Subsection (9)(a) or under the appropriate penalty provided by law, as the court in its discretion determines.

(c) Any person sentenced on a second offense to probation who violates that probation is subject to Subsections (9)(a) and (9)(b).

(d) Nothing in this section in any way limits or restricts Sections 76-8-1001 and 76-8-1002.

(10) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(11) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(12) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

**History:** L. 1971, ch. 145, § 8; 1972, ch. 22, § 1; 1977, ch. 29, § 6; 1979, ch. 12, § 5; 1985, ch. 146, § 1; 1986, ch. 196, § 1; 1987, ch. 92, § 100; 1987, ch. 190, § 3; L. 1988, ch. 95, § 1.

**Amendment Notes.** — The 1987 amendment, by Chapter 92 deleted "as provided in Section 58-1-44" following "the consent" in the first sentence in Subsection (2)(a)(v) and made minor stylistic changes.

The 1987 amendment, by Chapter 190 rewrote this section, which formerly read as it appears in the bound volume.

This section was set out in 1987 as reconciled by the Office of Legislative Research and General Counsel.

The 1988 amendment, effective April 25, 1988, substituted "convicted of violating" for

"who violates" throughout the section; deleted "upon conviction" preceding "guilty" in Subsections (1)(b)(i) to (1)(b)(iii), (2)(b)(ii), and (2)(d); in Subsection (2)(b) inserted Subsection (2)(b)(i); divided former Subsection (2)(b)(i) into present Subsections (2)(b)(ii) and (2)(b)(iii) and (2)(c) and designated former Subsection (2)(b)(ii) as Subsection (2)(d); designated former Subsection (2)(c) as Subsection (2)(e); in present Subsection (2)(b)(ii) inserted "if the amount is more than 16 ounces, but less than 100 pounds,"; in Subsection (3)(b) deleted "upon conviction" preceding "be punished" in the first sentence; in Subsection (4)(b) deleted "upon conviction" preceding "is guilty"; and made various stylistic changes throughout the section.

**Cross-References.** — Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

## NOTES TO DECISIONS

### ANALYSIS

#### Arranging sale.

Charging offense under Controlled Substances Act or Criminal Code.

—Jury instructions.

Distribution.

—Arranging to distribute.

—Distribution for value.

Entrapment.

Jury instruction.

Sufficiency of evidence.

—Constructive possession.

—Production of marijuana.

Cited.

#### Arranging sale.

This section unmistakably prohibits arranging to distribute a controlled substance. *State v. Renfro*, 735 P.2d 43 (Utah 1987).

#### Charging offense under Controlled Substances Act or Criminal Code.

##### —Jury instructions.

Wherever culpable conduct arises under the Controlled Substances Act and is specifically defined by it, it is incumbent upon trial courts to reject instructions to the jury under more general provisions outside the act. *State v. Scott*, 732 P.2d 117 (Utah 1987).

Although jury was improperly instructed on aiding and abetting rather than on Subsection (1)(a)(iv) of this section, because defendant was convicted of possession with intent to distribute a controlled substance and not of aiding and abetting, the aiding and abetting instruction was superfluous and not the basis of the jury's verdict, and the instruction error was harmless. *State v. DeAlo*, 748 P.2d 194 (Utah Ct. App. 1987).

#### Distribution.

In determining whether there is sufficient evidence to support a charge of distribution of a controlled substance for value, the relevant concern is whether the defendant performed the actual sale, or merely acted as an agent between the buyer and the source. The latter action does not fall within the prohibition of distribution of a controlled substance for value. *State v. Wright*, 67 Utah Adv. Rep. 25 (Ct. App. 1987).

The evidence was sufficient to support a conviction for distribution of a controlled substance where the defendant, who was approached with a request to sell marijuana to a police officer, agreed, quoted the selling price, and then personally delivered the contraband

and received the money at his apartment; he did not purport to merely find, direct, and introduce the officer to another drug dealer. *State v. Fixel*, 744 P.2d 1366 (Utah 1987).

##### —Arranging to distribute.

A person cannot be charged with aiding and abetting another when he or she handles the negotiations and price of a controlled substance, but must instead be charged with agreeing, consenting, offering, or negotiating to distribute a controlled substance as specifically provided in section 58-37-8(1)(a)(iv). *State v. Scott*, 732 P.2d 117 (Utah 1987).

Any willing or intentional lending of aid in the distribution of drugs, in whatever form the aid takes, is proscribed by Subsection (1)(a)(iv), and it is not necessary for the defendant to receive any value in exchange for drugs to be convicted. *State v. Gray*, 717 P.2d 1313 (Utah 1986).

##### —Distribution for value.

An exchange of cash for a controlled substance clearly falls within the broad definition of "distribution for value"; whether the defendant realizes a profit or not is irrelevant. *State v. Udell*, 728 P.2d 131 (Utah 1986).

#### Entrapment.

Defendant was not entrapped for unlawful distribution for value of a controlled substance where, although the police officer visited the defendant's office on several occasions, the visits were with defendant's invitation or consent. *State v. Erickson*, 722 P.2d 756 (Utah 1986).

The question of entrapment was properly left to the jury, where an undercover police officer, who had reason to believe that defendant was involved in drug trafficking, asked defendant to sell him cocaine on four occasions over a forty-day period and, on the fourth contact, de-

defendant agreed to sell him cocaine, made arrangements to pick it up, and sold him a gram. *State v. Udell*, 728 P.2d 131 (Utah 1986).

**Evidence sufficient to show intent to distribute.**

See *State v. Espinoza*, 723 P.2d 420 (Utah 1986).

**Jury instruction.**

The point of law covered under this catchline in the bound volume was overruled in *State v. Scott*, 732 P.2d 117 (Utah 1987).

**Sufficiency of evidence.**

In accord with 1986 Replacement Volume. See *State v. Bingham*, 732 P.2d 132 (Utah 1987).

Evidence was sufficient to sustain defendant's conviction for unlawful production of a controlled substance, where it was shown that marijuana was being cultivated and produced on a lot enclosed by a fence, in a greenhouse located twenty feet to the rear of defendant's dwelling, and only accessible through defendant's property. *State v. Watts*, 750 P.2d 1219 (Utah 1988).

**—Constructive possession.**

Actual physical possession is not a required

element of the crime of possession of a controlled substance. A finding of constructive possession by the defendant will satisfy the possession element. *State v. Hansen*, 732 P.2d 127 (Utah 1987).

To prove that a defendant was in knowing and intentional possession of a controlled substance, the prosecution need only establish that the produced contraband was found in a place or under circumstances indicating that the accused had the ability and the intent to exercise dominion and control over it. *State v. Hansen*, 732 P.2d 127 (Utah 1987).

**—Production of marijuana.**

In a trial for production of a controlled substance it was held that the state's evidence supported the trial court's finding that scientific tests (together with the objective observations of professional narcotics agents) proved beyond a reasonable doubt the substance seized from defendant was marijuana. *State v. Miller*, 740 P.2d 1363 (Utah Ct. App. 1987).

Cited in *State v. Neilsen*, 727 P.2d 188 (Utah 1986), cert. denied, — U.S.—, 107 S. Ct. 1565, 94 L. Ed. 2d 758 (1987).

**COLLATERAL REFERENCES**

**A.L.R. —** Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

Sufficiency of evidence that possessor of marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 79 A.L.R. Fed. 113.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(i), 78 A.L.R. Fed. 413.

Sufficiency of evidence that possessor of cocaine had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 397.

Sufficiency of evidence that possessor of controlled substance other than cocaine, heroin, or marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 507.