

1988

# Kevin R. Johnson v. Utah Industrial Commission Department of Employment Security Board of Review and Horton Thiokol Inc. : Amicus Curiae Brief

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS

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KEVIN R. JOHNSON,	:	AMICUS CURIAE BRIEF OF
	:	AMERICAN CIVIL LIBERTIES
Petitioner/Claimant,	:	UNION IN SUPPORT OF
	:	CLAIMANT/PETITIONER
s.	:	KEVIN R. JOHNSON
	:	
	:	
THE UTAH INDUSTRIAL COMMISSION	:	
DEPARTMENT OF EMPLOYMENT	:	
SECURITY BOARD OF REVIEW and	:	
MORTON THIOKOL, INC.,	:	No. 880703-CA
	:	
Respondents.	:	

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PETITION FOR REVIEW OF AN ADVERSE DECISION OF THE  
UTAH INDUSTRIAL COMMISSION DEPARTMENT OF EMPLOYMENT SECURITY  
BOARD OF REVIEW

Case No. 88-A-0368, Decision No. 88-BR-428, December 30, 1988

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IN THE UTAH STATE COURT OF APPEALS

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	:	AMERICAN CIVIL LIBERTIES
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	:	CLAIMANT/PETITIONER
vs.	:	KEVIN R. JOHNSON
	:	
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THE UTAH INDUSTRIAL COMMISSION	:	
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## I. JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction to review Industrial Commission Board of Review decisions by virtue of The Utah Administrative Procedures Act, Section 63-466-16.

## II. ISSUES PRESENTED FOR REVIEW

A. Was the Board of Review decision based on substantial evidence sufficient to support its conclusions?

B. Was the Board of Review's application of facts to law within the bounds of reasonableness and rationality?

C. Did the board of review act arbitrarily in issuing a decision contrary to applicable law?

D. Did the Board of Review violate equal protection by drawing an unreasonable classification with no rational relation to the Employment Security Act, or by giving disparate treatment to a member of a class on irrational bases with no relation to the Employment Security Act?

E. Did the Board of Review violate due process by applying the Unemployment Security Act in a manner arbitrary, unreasonable and with no rational relation to that Act?

## III. DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitution, Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Utah State Constitution, Article I, Section 7.

No person shall be deprived of life, liberty or property, without due process of law.

C. Utah State Constitution, Article I, Section 24.

All laws of a general nature shall have uniform operation.

D. Utah Employment Security Act, Utah Code Ann. Sections 35-4-2, 35-4-5(b) (1) .

35-4-2: Public Policy - General Welfare requires creation of unemployment reserves - employment offices. - As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nation-wide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons.



35-4-5. 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.

Claimant, Kevin R. Johnson, was discharged as an employee of Respondent Morton Thiokol. He applied for and was allowed unemployment compensation by the Utah Department of Employment Security. Morton Thiokol appealed the Department of Employment Security's decision to the Department of Employment Security Appeals Tribunal. Administrative Law Judge Norman Barnes heard the appeal, and upheld the decision of the Department of Employment Security, allowing benefits to Claimant Johnson. Morton Thiokol appealed the Administrative Law Judge's decision to the Industrial Commission Board of Review.

The Board of Review issued a first decision, No. 88-BR-086, on May 10, 1988. Claimant and Claimant's counsel were not given proper notice of that appeal, however, so the Board granted Claimant's motion to reconsider. The Board accepted written argument from Claimant and Morton Thiokol, and sua sponte

remanded the case to the Administrative Law Judge for the taking of additional evidence. The hearing on remand was held October 26, 1988. The Board of Review then issued its final decision on December 30th, 1988. The final Board of Review decision upheld its May 10, 1988 decision reversing the Administrative Law Judge, denying Claimant unemployment compensation, and requiring an overpayment to be deducted from any future benefits payable to him during that benefit year. Claimant seeks review of the Board of Review decision.

**B. STATEMENT OF FACTS**

Claimant Kevin R. Johnson was an employee of Morton Thiokol, Inc. Administrative Law Judge Hearing February 11, 1988 (Hearing), pg. 4. Johnson was involved in an auto accident while driving a company truck on company time. Hearing, pg 5, 10. Johnson was absolved of any fault in the accident, but was drug tested pursuant to a Morton Thiokol policy that mandates drug testing after any job related auto accident after which the employee needs medical attention.

Johnson's drug test after the auto accident, taken on September 21, 1987, showed positive for marijuana at 128 nanograms per milliliter. Administrative Law Judge Hearing on Remand, October 26, 1988 (Remand), pg. 23. Based on that positive test, Johnson was given a three day disciplinary suspension, counseling, and 12 months of probation in which he might be subjected to random drug testing. Hearing, pp. 5, 8. Johnson was drug tested again 65 days later, on November 25,

1987, and showed 25 nanograms per milliliter of marijuana metabolites. Remand, pg. 24. 20 nanograms is the threshold for a positive test. Id. Based on the second positive test which showed 25 nanograms, Johnson was discharged from his employment with Morton Thiokol. Hearing, pg. 5.

Johnson's personnel file showed him to be a satisfactory employee. Hearing, pg. 9. Morton Thiokol made no claim that Johnson used marijuana on the job or reported to work under its influence. Hearing, pp. 9-10. Johnson testified he never used marijuana on company premises or company time, and never reported to work under its influence. Hearing, pg. 11. He further testified he used no marijuana at all after the auto accident and the first drug test. Hearing, pg. 12. He testified that any exposure to marijuana he encountered would be from passive inhalation of his roommates' smoke. Hearing, pg. 13. Morton Thiokol's personnel representative, however, testified Morton Thiokol's test procedure was set-up through consultants so that passive inhalation would not result in a positive test. Hearing, pg. 13.

Morton Thiokol made no claim that the auto accident was the result of marijuana use by Johnson. Hearing, pg. 6. To the contrary, Johnson's supervisor reported that Johnson did not appear to be under the influence of marijuana at the time of the accident. Hearing, pg. 6. Morton Thiokol made no claim that Johnson acted against its interest in any way. Hearing, pg. 8. The sole reason Johnson was discharged from employment was the

second positive test. Hearing, pg. 5.

## V. SUMMARY OF ARGUMENT

### A. THE BOARD OF REVIEW DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT REASONABLE OR RATIONAL

The Board of Review's findings are not supported by substantial evidence and must be overturned. The Board of Review based its findings on the testimony of Morton Thiokol's in-house physician. In so doing, the Board of Review disregarded the Claimant's testimony which the Administrative Law Judge (ALJ) found to be credible, disregarded the bias of Morton Thiokol's physician and the conflicts in his own testimony, and disregarded the testimony of a more credible and qualified expert.

Also, the Board of Review decision was not within the bounds of reasonableness and rationality. First, the mere numbers of the test results compel the conclusion that Johnson had ceased marijuana use. Second, the Board of Review's decision that even passive inhalation is sufficient grounds for denial is plainly irrational. Finally, off the job marijuana use should be no concern of Morton Thiokol's or at least no concern of the Department of Unemployment Security in granting unemployment compensation.

### B. THE BOARD OF REVIEW ACTED ARBITRARILY IN ISSUING A DECISION CONTRARY TO ESTABLISHED LAW

The Utah Supreme Court and the Utah Court of Appeals have established an analysis for Boards of Review to follow in determining an applicant's qualification for unemployment compensation. The Board of Review arbitrarily ignored these

precedents and the analysis they require in denying Johnson benefits. Those precedents require the Board of Review to find the Claimant's culpability, knowledge and control sufficient for a rightful denial of unemployment compensation. Application of Johnson's case to the analysis established by this Court and the Utah Supreme Court compels reversal of the Board of Review decision.

The Board of Review ruled that any positive test for marijuana is grounds for denial of unemployment benefits, regardless of the claimant's culpability, knowledge and control. This ignores logic, rationality, fairness and the Board of Review's obligation to act in accord with standards set by established precedent. This arbitrary Board of Review action should be reversed.

**C. THE BOARD OF REVIEW VIOLATED STATE AND FEDERAL GUARANTEES OF EQUAL PROTECTION OF THE LAWS**

The Board of Review's decision violates state and federal equal protection. These Constitutional guarantees may be violated both in enacting statutes and rules, and in their execution by government officials. Administrative bodies are subject to the limitations of equal protection. Here, the Board of Review's *flawed application of an otherwise constitutionally valid statute* violated equal protection.

First, classifications and the different treatment given the classes must be rationally related to the purpose of the statute. The Board of Review's decision has the effect of creating a separate class of all employees fired for positive drug tests

whose drug use does not relate to work performance. All other claimants will be reviewed under the culpability, knowledge and control standard established by this Court. Those, such as Johnson, with positive drug tests will be denied compensation merely on the result of the test, despite the many circumstances which may give rise to a positive test, and despite the fact that any drug use may have had no negative impact on the employer. This simply has no rational and just relationship to the purpose of the employment compensation statutes and rules. Therefore, the only class which may be fashioned with a rational relationship to the purposes of the Employment Security Act is the class comprised of all employees, otherwise qualified, who are challenged as having been terminated for just cause.

Having defined the class, the law must be applied equally to all class members. All other members of the class are judged on a standard which requires some conduct of the claimant which injured the employer in its business, i.e., some job related conduct. To deny benefits to Johnson for conduct not related to the job is an irrational distinction not related to the purpose of the statute, and violates equal protection.

**D. THE BOARD OF REVIEW DECISION VIOLATES SUBSTANTIVE DUE PROCESS**

Substantive due process protects individuals from arbitrary action of state administrative agencies. The Board of Review decision holds that mere association with marijuana users is sufficient grounds for denial of unemployment compensation. That is arbitrary and unreasonable and a denial of due process.

Second, to deny benefits to Johnson for conduct not related to his job performance or the interest of the employer is arbitrary, irrational and unrelated to the purpose of the Employment Security Act. Finally, the Board of Review's failure to properly apply applicable law is arbitrary, unreasonable, and a violation of due process.

## VI. ARGUMENT

### A. THE BOARD OF REVIEW DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT REASONABLE OR RATIONAL

The Board of Review decision to reverse the award of benefits by the ALJ should be overturned by this Court and remanded to the Board of Review to reinstate the prior award of employment compensation. Decisions of the Utah Industrial Commission Boards of Review are reviewed by an intermediate standard, under which the Court must determine if the Board of Review decision was "within the bounds of reasonableness and rationality." Champlin Petroleum v. Department of Employment Security, 744 P.2d 330, 331 (Utah Ct. App. 1987); Sevier County Board of Ed. v. Board of Review, 701 P.2d 1064, 1067 (Utah 1985). The Court's review of the facts is "limited to a determination of whether the Commission's findings are supported by substantial evidence." Logan Hospital v. Board of Review, 723 P.2d 427, 429 (Utah 1986). Here, The Board of Review's decision is based on evidence which no reasonable person could find to be credible, in direct conflict with contrary findings of the Administrative Law Judge (ALJ). The application of law to those facts is logically

strained and apparently oriented to a preconceived result. The decision, therefore, must be overturned as unreasonable and irrational.

The Board of Review's findings are not supported by substantial evidence and must be overturned. The Board of Review based its findings on the testimony of Morton Thiokol's in-house physician. In so doing, the Board of Review disregarded the Claimant's testimony which the ALJ found to be credible, disregarded the bias of Morton Thiokol's physician and the conflicts in his own testimony, and disregarded the testimony of a more credible and qualified expert.

In administrative proceedings of the Department of Employment Security, the hearing at which witnesses are sworn and testimony is taken is conducted before an ALJ. That hearing serves the trial court function. The ALJ is the trier of fact, and should be accorded the deference given to trial courts as triers of fact in other proceedings. See Young v. Board of Review, 731 P.2d 480, 482 (Utah 1986) (findings of administrative law judge will not be substituted where supported by ample evidence); Logan Regional Hosp. v. Board of Review, 723 P.2d at 428 (it is for administrative agency to choose between conflicting facts); Lane v. Board of Review, 727 P.2d 206 (Utah 1986) (giving findings of administrative law judge deference over findings of board of review).

Here, the ALJ witnessed Johnson's testimony that he had not used marijuana since before September 1987, the date of the first



positive test. The ALJ found that testimony to be credible, finding that claimant "denied any consumption of marijuana since September and attributes the positive test to passive inhalation." Administrative Law Judge Decision (ALJ Dec.) pg. 2. The ALJ further found Johnson "emphatically denies using marijuana after September, 1987." ALJ Dec. pg. 3. Morton Thiokol did not refute that testimony, but rather admitted they "are not stating when Mr. Johnson took the substance. All our tests show is there was a substance in his system." Hearing, Testimony of Jim Fox, pg. 9. The ALJ thus concluded "the claimant was not discharged from his employment for just cause or for an act or omission in connection with employment that was deliberate, willful or wanton and adverse to the employer's rightful interests." ALJ Dec. pg. 3.

The Board of Review disregarded the ALJ's findings and found Johnson's testimony that he ceased marijuana use after the first test to not be credible. Board of Review Decision No. 88-BR-428, pg. 2. The Board of Review did so on the basis of a cold record, without deference to the ALJ's ability as trier of fact to weigh Johnson's credibility face to face. Rather, it based its decision on the strained logic that if Johnson lived with marijuana users, he must use marijuana himself, and that the remaining minimal presence of marijuana in Johnson's system was sufficient evidence of continued use. That reasoning does not give just deference to the ALJ's findings and is not based on evidence of any substance. The Board of Review's findings should

thus be overturned.

The Board of Review also based its decision on the testimony of Morton Thiokol's in-house physician. Before issuing its final decision the Board of Review remanded the matter to the ALJ for more fact taking. Board of Review Decision No. 88-BR-086, September 27, 1988. The Board of Review requested the Board to subpoena Dr. Ellwood Loveridge, Director of Scientific Support Services of the Salt Lake County Health Department, to provide information regarding drug testing and drug metabolism, and requested Morton Thiokol to provide better evidence of its testing procedures and Johnson's tests specifically. Id. Dr. Loveridge was properly subpoenaed and attended. Administrative Law Judge Remand Hearing (Remand), pg. 2. However, Morton Thiokol did not properly prepare its hearing representative, so its hearing representative came to the hearing with no additional evidence. Remand, pg. 4. At the ALJ's request, Morton Thiokol's in-house physician was contacted by conference telephone to provide some of the information Morton Thiokol was to have prepared for the remand hearing. Remand, pg. 5.

Morton Thiokol's in-house physician, Dr. Kerr, was originally called to testify as to Morton Thiokol's testing procedure, and as to Johnson's test results, so Dr. Loveridge would have accurate information on which to opine. Remand, pp. 6-7 & 20-24. However, as the examination progressed, Dr. Kerr was put in the position of being both a fact witness and an expert witness as to his own facts. Remand, pp. 24-28. Dr. Kerr

is Morton Thiokol's Medical Director, in charge of supervising the drug tests and the drug screening program. Administrative Law Judge Hearing (Hearing), pg. 6; Remand, pp. 21-22. He therefore testified as to the propriety and fairness of his own testing program. His bias was clear in his conflicting testimony, and brings into question the credibility of his opinions.

Dr. Kerr first testified that the results of Johnson's first test in September showed a presence of marijuana metabolites of 128 nanograms per milliliters. Remand, pg. 23. Johnson was tested 65 days later and showed the presence of 25 nanograms per milliliter. Id. 20 nanograms per milliliter is considered a positive test result. Id.

Dr. Kerr went on to testify that he is familiar with human toxicology, but he is not a specialist in that field. Remand, pg. 24. He testified, however, he has knowledge of the length of time marijuana residue remains in the body. Remand, pg 25. He testified "[i]t is one of the longer lasting substances that can be detected." Id. And, after chronic use, it "can be detected by the tests we [Morton Thiokol] are using for several weeks after its usage is discontinued." Id. Dr. Kerr then responded to an inquiry about an experiment which showed positive results for up to 81 days after marijuana ingestion. He testified 81 days "would fit into the range of several weeks that I have in mind, yes." Id.

Dr. Kerr testified that Johnson's reduction from 128 to 25

nanograms per milliliter would be considered a significant reduction. Id. As to what happened between the two tests to cause the reduction, Dr. Kerr testified:

Well as I said it is a significant lower result, which could mean decreased or discontinued use of the substance. We can't predict how long before that 25 nanogram level was found the last exposure to marijuana occurred. I don't know of any way to predict that other than we do know there is a prolonged time in which it remains positive.

Remand, pg. 26 (emphasis added). Then in response to the specific question of whether the claimant not have used marijuana between the first and second tests, Dr. Kerr reversed his prior responses, answering:

No, because we are talking there about, I believe, 2 1/2 months. I know of nothing to indicate that prolonged positive result after discontinued use.

Remand, pg. 26. He testified that "4 to 6 weeks is as long as I am aware of any studies confirming [marijuana metabolites in urine]." Asked if he recalled studies longer than 24 days, he testified: "Not that I am personally acquainted with." Remand, pp. 27-28.

In its final decision the Board of Review disregarded Dr. Kerr's testimony that a person could test positive for marijuana use after 81 days of abstinence. It similarly disregarded Dr. Kerr's testimony that the dramatic decrease in the level of Johnson's test results could mean discontinued use of marijuana, and his testimony that they "can't predict how long before that 25 nanogram level was found the last exposure to marijuana occurred." Remand, pg. 26; See 88-BR-428, pg. 2. In short, the

Board of Review chose selectively among Dr. Kerr's biased, conflicting testimony to find evidence to support its position. To the contrary, the weight of Dr. Kerr's testimony compels the conclusion that a 25 nanogram test result found 65 days after a 128 nanogram result is simply the product of residue from previous marijuana use, or residue combined with passive inhalation. The Board of Review decision therefore is not supported by substantial evidence.

In addition, the Board of Review similarly disregarded competent evidence from an unbiased expert. At the Board of Review's request, the ALJ called Dr. Ellwood L. Loveridge to offer expert testimony on the drug test results. Dr. Loveridge testified he did not study drug screening in school, but had since studied drug testing at seminars and through private reading. Remand, pg. 15. He testified his office had done a number of marijuana tests. Dr. Loveridge testified "there is a lot of controversy on how long marijuana stays in the body. Remand, pg. 16. He testified that the Health Department had conducted anonymous studies in which credibility is likely to be very high. Remand, pg. 28. He testified:

But we have had people who have tested as high as Mr. Johnson did in the 120's who have been positive for three months afterwards and are anxious to get it down because they have been going to take a test with an employer. And so they have asked if I knew of any way to speed up its elimination and I don't know of any way. It is fat soluble and it does take a long time to get metabolized and excreted. But we have had them for over three months still testing above our threshold which is 25. And it doesn't come down in a straight line. They will test one time at 120 and the next time at 100 and the next, three or four days later it will

test back up at 115.

Remand, pg. 28. As to passive inhalation, Dr. Loveridge testified:

Now again, I have to preface it with a, we don't have the money nor the interest to do the publishable type study that would be nice to have. We are not going to do it. But passive inhalation, I think has been done mostly with people who haven't had marijuana and then they put them in a room with others who are smoking, or in a closed car, and measure their levels. But a person who has smoked has a base line that is higher than a non-smoker. And it doesn't take many nanograms for a person who has a base line of 18 to test positive with the EMIT system. And so I think passive inhalation has been given the wrong credit because we have tested it with non-users and when we try and extract those results to users, they are not legitimate. So I think passive inhalation is a factor, or can be a factor in a person who has a residual, marijuana layer, in their body so to speak.

Remand, pg. 30.

Thus, Dr. Loveridge's independent, unbiased testimony clearly supports Johnson's assertion that Johnson's 25 nanogram test was the result of residue from his use of marijuana prior to his first Morton Thiokol drug test, or the result of residue plus passive inhalation. The Board of Review, however, did not consider Loveridge's testimony.

Claimant's counsel had initially raised an objection to Dr. Loveridge's qualification as an expert. The Board of Review granted that motion and disregarded Dr. Loveridge's testimony. Johnson's counsel however, made his objection before Dr. Loveridge had testified. Once Dr. Loveridge testified, it became clear he was a qualified expert and gave competent testimony. An expert witness is one who is "qualified as an expert by

knowledge, skill, experience, training, or education . . .” Utah Rules of Evidence, Rule 702. Dr. Loveridge’s salient, insightful answers at the Hearing clearly show he meets this minimal standard. Certainly compared to Dr. Kerr, whose expert testimony was allowed, Dr. Loveridge was a qualified expert. Once accepted as an expert, the credibility of his testimony may of course be weighed just as is done with any other witness. The Board of Review erred in not considering his testimony, and instead fashioning a ruling on flawed testimony without the substance to support its decision.

The sum of the testimony before the Board of Review was therefore as follows. Marijuana clearly is detectable in the urine for long periods of time. Morton Thiokol’s test does not show how long before the test was administered the subject used marijuana. A past chronic user of marijuana may have a base line amount of marijuana in his system that is fairly high, so he is much more likely than one who has never used marijuana to show positive after being subjected to passive inhalation. Finally, Johnson testified emphatically that he had not used marijuana since his first Morton Thiokol drug test. The ALJ who witnessed Johnson’s testimony found Johnson to be credible. The weight of evidence, therefore, weighs in favor of Johnson’s assertions. The evidence on which the Board of Review relied lacks the substance to support its decision. Therefore, if Johnson had not smoked marijuana after the first test as the evidence supports, he was not fired for just cause and should be allowed

unemployment compensation.

Not only was the Board of Review decision not based on substantial evidence, it also was not "reasonable or rational." Sevier County Board of Education v. Board of Review, 701 P.2d 1064, 1067 (Utah 1985). First, the mere numbers of the test results compel the conclusion that Johnson had ceased marijuana use. Second, the Board of Review's decision that even passive inhalation is sufficient grounds for denial is plainly irrational. Finally, off the job marijuana use should be no concern of Morton Thiokol's or at least no concern of the Department of Unemployment Security in granting unemployment compensation.

Johnson first tested positive at 128 nanograms. 65 days later he tested at 25 nanograms. This is a 500% reduction in 65 days. A positive result is 20 nanograms, so Johnson was just barely positive. Given the uncertainty about the length of time marijuana remains in the body, logic dictates that Johnson's 25 nanogram test was the result of residue from marijuana use prior to his first test. Additionally, Johnson testified he was subject to passive inhalation of his roommates' smoke. The marijuana from this passive inhalation would combine with Johnson's base line residue to produce an even higher result. Logic and reason compel the conclusion that Johnson's barely positive test result was not the product of continued marijuana use but the product of factors completely beyond his control.

Second, the Board of Review held that even passive



inhalation of other's marijuana smoke is no less "culpable or harmful in its effect than direct inhalation of marijuana smoke." Board of Review Decision No. 88-BR-428, pg. 4. Thus, mere association with marijuana users would be sufficient grounds for denial of unemployment compensation. It is patently absurd that an employee may be discharged and denied unemployment compensation based on violation of an employer's drug policy without having used the drug. The Board of Review's holding that passive inhalation is sufficient grounds for denial of unemployment compensation is plainly unreasonable.

Finally, as the ALJ held, "[t]he claimant's activities while off the job, however, should be of no concern to the employer unless it is shown his job performance is negatively impacted." ALJ Dec., pg 3. Johnson was initially tested because of an automobile accident that was determined to not be his fault. Hearing, pg. 5. Morton Thiokol made no claim that Johnson used marijuana on the job or reported to work under its influence. Hearing, pp. 9-10. Morton Thiokol's representative testified that Johnson was a satisfactory employee. Hearing, pg. 9. He was discharged solely on the basis of his positive drug test. Hearing, pg. 5. The Board of Review thus denied unemployment compensation to a satisfactory employee, discharged for conduct with no relation whatsoever to his job or job performance. That is plainly irrational and unreasonable.

The Board of Review's decision is not supported by substantial evidence, and ignored credible, compelling evidence

to the contrary. The Board of Review decision denied simple logic, and is plainly irrational and unreasonable. This Court should therefore reverse the Board of Review and allow benefits as determined by the Administrative Law Judge.

**B. THE BOARD OF REVIEW ACTED ARBITRARILY IN ISSUING A DECISION CONTRARY TO ESTABLISHED LAW**

The Utah Supreme Court and the Utah Court of Appeals have established an analysis for Boards of Review to follow in determining an applicant's qualification for unemployment compensation. Logan Regional Hospital v. Board of Review, 723 P.2d 427 (Utah 1986); Champlin v. Board of Review, 744 P.2d 330 (Utah Ct. App. 1987). The Board of Review arbitrarily ignored these precedents and the analysis they require in denying Johnson benefits. Application of Johnson's case to the analysis established by this Court and the Utah Supreme Court compels reversal of the Board of Review decision.

It is well settled that not every ground for termination of employment is a ground for denial of unemployment compensation. Champlin, 744 P.2d at 331; Logan Hospital, 723 P.2d at 429; Sevier County Board of Education v. Board of Review, 701 P.2d 1064, 1068 (Utah 1985). Private employers such as Morton Thiokol have almost plenary discretion to hire and fire, except as controlled by collective bargaining agreements, employment contracts and state and federal anti-discrimination laws. The State of Utah, however, in considering claims for unemployment compensation through the Department of Employment Security, may

not act arbitrarily, but must act rationally and reasonably. This means the Department of Employment Security and its Boards of Review must act in accord with the statutes and rules that control them, and in accord with cases interpreting those statutes and rules. Unemployment compensation may only be denied an otherwise qualified claimant on a showing that the employee was at fault as defined by Utah Code Ann. Section 35-4-5(b)(1) and cases that interpret that section.

Unemployment compensation may only be denied an otherwise qualified applicant if:

the claimant was discharged for just cause, or for an act or omission in connection with employment, not constituting a crime, which was deliberate, wilful or wanton, and adverse to the employees rightful interest.

Utah Code Ann. §35-4-5(b)(1) (emphasis added); Logan Hospital, 723 P.2d at 429-30; Champlin, 744 P.2d at 330-32. That statute has been interpreted to require fault of the employee, based on a three part showing of the employee's culpability, knowledge and control. Champlin, 744 P.2d at 331.

Culpability for purposes of that standard is explained in the Unemployment Insurance Rules of the Utah Department of Employment Security as follows:

This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employers 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) cited in Champlin, 744 P.2d at 332 (emphasis added).

To justify a denial of benefits, therefore, the conduct giving rise to the termination must have been committed on the job or have impacted job performance. Champlin, 744 P.2d at 331. In Champlin, the claimant had worked alone at a job with a great deal of responsibility. Champlin Petroleum v. Dept. of Employment Security, 744 P.2d 330, 330-31 (Utah Ct. App.1987). After years of successful job performance the claimant suffered a mental breakdown caused by a mental illness, the symptoms of which were exacerbated by claimant's marijuana use. On the claimant's return to work his doctor recommended that he be supervised on the job for a time. Because his job required him to work alone he was discharged. The claimant was granted unemployment compensation and the employer appealed.

The Champlin claimant testified that he smoked marijuana twice a week for some time while he worked for the Champlin employer. There was no evidence that he used marijuana on the job or reported to work under its influence. The claimant's supervisor testified that the claimant had been a satisfactory employee. The Champlin Court found 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 unemployment benefits." Champlin, 744 P.2d at 333.

In the present action there was no evidence that Johnson smoked marijuana on the job, was impaired by the drug on the job, or acted in any other way contrary to Morton Thiokol's rightful interests. Hearing, pp. 8-11. In fact, Morton Thiokol made no claim that Johnson acted against Morton Thiokol's interest in any way. Id. at pp. 8-9. In Champlin, the claimant's off the job marijuana use exacerbated a mental illness which was the cause of the claimant's inability to work and the reason he was ultimately fired. Here, Johnson's marijuana use had absolutely no impact on his job performance or his ability to continue as a satisfactory employee of Morton Thiokol. Johnson, even more than the Champlin claimant, thus lacked the culpability necessary for a denial of unemployment compensation.

The uncontroverted testimony before the Board of Review was that Johnson used no marijuana after the first positive test. Nonetheless, from a cold record without the benefit of witnessing Johnson's examination, the Board of Review found that testimony to not be credible and assumed Johnson had continued to use marijuana. Board of Review Decision No. 88-BR-428, pp. 3-4. However, even if Johnson had used marijuana off the job, in a way which did not impair his job performance, Champlin compels the conclusion that Johnson would lack the culpability necessary for a denial of unemployment compensation.

The Board of Review did not find that Johnson's marijuana use impaired his job performance, or that Johnson used marijuana on the job or reported for work under influence of the drug.

Rather, the Board of Review found that any presence of marijuana sufficient to test positive under Morton Thiokol's standard for any reason was sufficiently adverse to Morton Thiokol's interest to warrant termination for just cause and denial of benefits. 88-BR-428, pg. 4. The Board went so far as to hold that even if the presence of the drug was a result of passive inhalation from others, it would be sufficient to deny Johnson his unemployment benefits. Id. As discussed above this ignores logic and reason, but it also ignores the clear precedent established by this Court and the Utah Supreme Court. The logic of Champlin is intact, and its application is fair and reasonable. The Board of Review's arbitrary departure from Champlin's reasoning is itself sufficient grounds for reversal.

The second necessary element of a claimant's fault is knowledge that the conduct will likely result in termination. Champlin, 744 P.2d at 331; Grinnell v. Board of Review, 732 P.2d 113, 114 (Utah 1987); Green v. Board of Review, 728 P.2d 966 (Utah 1986). Such knowledge "may not be established unless the employer gave a clear explanation of the expected behavior." Green, 728 P.2d at 998. Here, Johnson understood that a second positive test would likely result in termination, but he was not given an explanation of what a positive test level actually was, or the conduct that would likely result in a positive test. As discussed at length elsewhere in this brief, Johnson's uncontroverted testimony was that he did not smoke marijuana after the first test but was subject to passive inhalation.

Hearing, pp. 12-13. It is highly unlikely that Johnson understood passive inhalation could result in a positive test and subject him to termination. Another likely explanation for the second test result was the lingering presence of marijuana in his system. Dr. Loveridge testified that test subjects with marijuana levels similar to Johnson's tested positive up to 120 days after discontinued use. Remand, pg. 28. Another independent tests show positive tests for marijuana 81 days after ingestion. National Law Journal, Drug Testing: The Scene is Set for a Dramatic Legal Collision, Vol. 8, No. 29, Mon. 4/7/86. Because Johnson used no marijuana after the first test, he committed no conduct which he knew would likely result in termination. Johnson therefore lacks the required element of knowledge that the conduct for which he was fired would likely result in termination.

Finally, the conduct for which the claimant was fired must have been in the claimant's control. Champlin, 744 P.2d at 331-32. Here, as discussed above, the uncontroverted testimony was that the presence of marijuana in Johnson's system was due to factors totally outside his control. Johnson testified that if there was marijuana in his system it must have been from his passive inhalation of his roommates' daily marijuana use. Hearing, pp. 12-13. The other logical explanation for the positive test was the residue of marijuana in his system from previous use. Certainly Johnson had no control over the speed at which his body rid itself of the drug. Thus Johnson had no

control over the small amount of marijuana in his system which caused the positive test and his termination from Morton Thiokol.

Johnson therefore lacked the culpability, knowledge and control necessary for a rightful denial of unemployment compensation. The Board of Review did not follow the analysis established by this Court, but instead ruled that any positive test for marijuana is grounds for denial of unemployment benefits, regardless of the claimant's culpability, knowledge and control. This ignores logic, rationality, fairness and the Board of Review's obligation to act in accord with standards set by established precedent. This arbitrary Board of Review action should be reversed.

**C. THE BOARD OF REVIEW VIOLATED STATE AND FEDERAL GUARANTEES OF EQUAL PROTECTION OF THE LAWS**

The Board of Review's decision violates state and federal equal protection. Article I, Section 24 of the Utah State Constitution provides: "All laws of a general nature shall have uniform operation." The Fourteenth Amendment to the United States Constitution prohibits states from denying to "any person within its jurisdiction the equal protection of the laws." These Constitutional guarantees may be violated both in enacting statutes and rules, and in their execution by government officials. Arrington v. Mass. Bay Transit Authority, 306 F.Supp. 1355, 1358 (D.Mass. 1969). Administrative bodies are subject to the limitations of equal protection. Hennessey v. Ind. School Dist., 552 P.2d 1141, 1152 (Okla. 1976). Here, the Board of



Review's flawed application of an otherwise constitutionally valid statute violated equal protection.

Equal protection requires a two part analysis. First, "classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984); State Tax Commission v. Dept. of Finance, 576 P.2d 1297 (Utah 1978). Under both state and federal law, a "classification must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Malan, 693 P.2d at 672 quoting McLaughlin v. Florida, 379 U.S. 184 (1964).

Here, the Board of Review's decision has the effect of creating a separate class of all employees fired for positive drug tests whose drug use does not relate to work performance. All other claimants will be reviewed under the culpability, knowledge and control standard applied in Champlin. Those, such as Johnson, with positive drug tests will be denied compensation merely on the result of the test, despite the many circumstances which may give rise to a positive test, and despite the fact that any drug use may have had no negative impact on the employer. This simply has no rational and just relationship to the purpose of the unemployment compensation statutes and rules.

The purpose of the Employment Security Act and the relative departmental rules is to determine the eligibility of claimants,

and to affect the distribution of benefits to those qualified. Utah Code Ann. § 35-4-2. Those claimants who are shown to have been fired for just cause for job related misconduct will be rightfully denied benefits, and those who were not fired for just cause within the meaning of the statute will be allowed to benefit from the ameliorative effects of unemployment compensation. The distinction drawn by the Board of Review bears no rational relation to that purpose, so the class lines drawn by the Board of Review decision are impermissibly narrow.

The only class which may be fashioned with a rational relationship to the purposes of the Employment Security Act is the class comprised of all employees, otherwise qualified, who are challenged as having been terminated for just cause. Having thus defined the class, the applicable statutes and rules as they have been interpreted may be applied to individual cases to determine qualified applicants. Johnson and others similarly situated are members of that class, and must be treated in parity with other class members.

Second, having defined the class, the law must be applied equally to all class members. Malan, 693 P.2d at 670; State Tax Commission, 576 P.2d at 1298. Disparate treatment of class members must be rationally related to the purpose of the statute. Id. "When persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a larger class on the basis of a tenuous justification that has little or no merit." Malan, 693 P.2d at 671; See Dodge Town Inc. v. Romney,

480 P.2d 461 (Utah 1961).

Here, all other members of the class are judged on a standard which requires some conduct of the claimant which injured the employer in its business, i.e., some job related conduct. To deny benefits to Johnson for conduct not related to the job is an irrational distinction not related to the purpose of the statute. The purpose of the Employment Security Act is to determine the qualification of claimants to receive unemployment compensation and to distribute those benefits to qualified claimants. Utah Code Ann. § 35-4-2. Unemployment compensation is an ameliorative measure which should be liberally construed to achieve its purpose. Logan Hospital, 723 P.2d at 429. Rather, in its decision the Board of Review references the purposes of the Utah Drug and Alcohol Testing Act, to create a drug free work force and quality products. Board of Review Decision 88-BR-428, pg. 3; See Utah Code Ann. § 34-38-1. The Drug and Alcohol Testing Act, however, was not passed to determine the qualification of applicants for unemployment compensation, and is not rationally related to that end. We must assume the Drug and Alcohol Testing Act will achieve its purpose without the misplaced aid of the Industrial Commission Board of Review. The objectives and means of the Employment Security Act must guide the Boards of Review in determining awards of unemployment compensation. To follow another purpose is arbitrary and irrational and violates equal protection.

Johnson is similarly situated with all other applicants

otherwise qualified to receive unemployment compensation. If his qualification is challenged, he must be reviewed under the same standard applicable to all other members of his class, the standard of fault applied in Champlin and other cases. There is no reason rationally related to the purpose of the Employment Security Act which justifies the Board of Review's departure from that true course.

**D. THE BOARD OF REVIEW DECISION VIOLATES SUBSTANTIVE DUE PROCESS**

Article I, Section 7 of the Utah State Constitution provides: "No person shall be deprived of life, liberty or property, without due process of law." The Fourteenth Amendment to the United States Constitution similarly imposes on states the same obligation. Stated simply, substantive due process protects individuals from arbitrary action of state administrative agencies. Wilwording v. Swenson, 502 F.2d 844 (8th Cir. 1974) (disciplinary action of the Missouri State Penitentiary). The Utah Supreme Court stated in relation to agency action: "If the act operates equally and affords freedom from arbitrary action it satisfies the requirements of substantive due process. Due process may be characterized as a standard of reasonableness." Mineer v. Board of Review, 572 P.2d 1364, 1366 (Utah 1977). The rights secured by substantive due process may be violated by enacting a violative statute, or by flawed construction or application of a statute valid on its face. Oney v. Oklahoma City, 120 F.2d 861, 865 (10th Cir. 1941); See T.R.F. v. Falan,

760 P.2d 906, 914-15 (Utah App. 1988) (statutory scheme constitutional but application by court violated due process). Here, the Board of Review's arbitrary and unreasonable denial of Johnson's unemployment compensation violates due process.

First, the effect of the Board of Review decision is to deny benefits to one who has taken no affirmative act in derogation of his right to benefits. Johnson's uncontroverted testimony was that he tested positive as a result of passive inhalation of others' marijuana smoke or as a result of residue. The Board of Review found that if passive inhalation were sufficient to register a positive test it would be sufficient cause for a denial of benefits. Thus mere association with marijuana users is sufficient grounds for denial of unemployment compensation. That is arbitrary and unreasonable and a denial of due process.

Further, as discussed in relation to equal protection, Johnson was denied unemployment compensation for conduct wholly unrelated to his job performance. Although such conduct may be sufficient grounds for termination by a private employer, it is not a sufficient basis to deny Johnson unemployment compensation. To deny benefits to Johnson for conduct not related to his job performance or the interest of the employer is arbitrary, irrational and unrelated to the purpose of the Employment Security Act.

Finally, the Board of Review singled out Johnson for a denial of benefits in contradiction of established precedent. Although a Morton Thiokol employee might understand that off the

job marijuana use may subject him to loss of his job, Johnson could not have known that such conduct would subject him to loss of his unemployment benefits because the established law was contrary. If the Board had properly applied the three prong test of Champlin it would have found in favor of Johnson and allowed benefits. The Board of Review's failure to properly apply applicable law is arbitrary, unreasonable, and a violation of due process.

The Board of Review's decision, therefore, is arbitrary and unreasonable of its own logic. It also has no rational relation to the purpose of the Employment Security Act which it purports to apply. It therefore violates Johnson's rights protected by substantive due process and must be overturned.

## VII. CONCLUSION

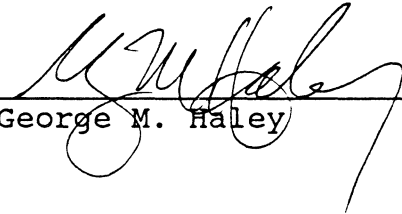
The Board of Review's decision to reverse the award of benefits by the Administrative Law Judge should be overturned by this Court and remanded to the Board of Review to reinstate the prior award of unemployment compensation. The Board's decision is not based on substantial evidence, nor are its conclusions rational or reasonable. It blatantly disregards established precedent of this Court and the Utah Supreme Court. It violates equal protection because its ruling applies to an impermissibly narrow class, or because it singles out a group within an appropriate class for grossly disparate treatment. Finally, it violates substantive due process because it applies the

Employment Security Act in a manner with no reasonable relation to that Act's purpose. This Court, therefore, should overturn the Board of Review's decision and order the Board of Review to reinstate Claimant's award of unemployment compensation.

DATED this 15th day of March, 1989.

Respectfully submitted,

HALEY & STOLEBARGER

  
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George M. Haley

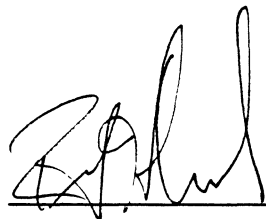
CERTIFICATE OF SERVICE

I hereby certify that the attached AMICUS CURIAE BRIEF was hand delivered or mailed, postage prepaid, on March 15th, 1989 to the following:

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