

1989

John P. Shupe v. Board of Review of the Industrial Commission of Utah, Department of Employment Security, and Les Olson Company : Brief of Respondent

Utah Court of Appeals

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Winston M. Faux; R. Paul Van Dam; attorney general; Attorney for Respondent.

Ward Harper; Utah Legal Services; Attorneys for Petitioner.

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STATE COURT OF APPEALS
BRIEF

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DOCKET NO. 890158-CA ~~IN THE~~ UTAH COURT OF APPEALS

JOHN P. SHUPE,

Claimant-Petitioner,

vs.

Case No. 890158-CA

BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY, and LES OLSON
COMPANY,

Category 6

Respondents.

RESPONDENTS' BRIEF

**Petition for Review of a Decision of the
Board of Review of the Industrial Commission,
Unemployment Insurance Division,
State of Utah**

**R. PAUL VAN DAM
Attorney General**

**WINSTON M. FAUX - 1049
Special Assistant
Attorney General
1234 South Main Street
Salt Lake City, Utah 84147
Telephone: (801) 533-2510**

**WARD HARPER
UTAH LEGAL SERVICES, INC.
124 South 400 East, #400
Salt Lake City, Utah 84111
Telephone: (801) 399-9636**

**Attorney for Petitioner
John P. Shupe**

**Attorney for Respondent
Board of Review, Industrial
Commission of Utah**

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IN THE UTAH COURT OF APPEALS

JOHN P. SHUPE,

Claimant-Petitioner,

vs.

Case No. 890158-CA

BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT OF
EMPLOYMENT SECURITY, and LES OLSON
COMPANY,

Category 6

Respondents.

RESPONDENTS' BRIEF

JURISDICTION OF THE COURT OF APPEALS

Jurisdiction over this Petition for Review is conferred upon the Utah Court of Appeals by §35-4-10(i), Utah Code Annotated 1953, as amended, and §78-2a-3(2)(a), Utah Code Annotated 1953 (1987 Replacement Volume).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented in this case are whether the decision of the Board of Review that Claimant John P. Shupe was discharged by Les Olson Company for just cause within the meaning of §35-4-5(b)(1), Utah Code Annotated 1953, as amended (hereafter also the "Act") is based upon a determination of fact, made or implied by the Board of Review, that is supported by substantial evidence in the record, and whether the conclusions of the Board of Review, i.e., the application of the findings of basic facts to the legal rules governing the case, fall within the limits of reasonableness and rationality as per the intermediate standard of review applicable in this administrative proceeding.

STATUTES AND RULES APPLICABLE TO THE CASE

The following statutes and rules, which are determinative in this matter, are set forth verbatim in Appendix A:

§35-4-5(b)(1), U.C.A. 1953, as amended.

Rule R475-5b1-1, Unemployment Insurance
Rules of the Department of Employment Security (Utah Administrative Code 1987-1988).

Rule R475-5b1-2, Unemployment Insurance
Rules of the Department of Employment Security (Utah Administrative Code 1987-1988).

Rule R475-5b1-7, Unemployment Insurance Rules of the Department of Employment Security (Utah Administrative Code 1987-1988).

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§35-4-5(b)(2), U.C.A. 1953, as amended.

Rule R475-5b2-5, Unemployment Insurance Rules of the Department of Employment Security (Utah Administrative Code 1987-1988).

§35-4-10(i), U.C.A. 1953, as amended.

§63-46b-16(4), U.C.A. (1988 Replacement Volume).

§63-46b-16(4)(d), U.C.A. (1988 Replacement Volume).

§63-46b-16(4)(g), U.C.A. (1988 Replacement Volume).

§78-2a-3(2)(a), U.C.A. 1953 (1987 Replacement Volume).

STATEMENT OF THE CASE

After being discharged from his employment at Les Olson Company, Claimant-Petitioner John P. Shupe (hereafter also "Shupe" or "claimant") filed a claim for unemployment benefits effective October 2, 1988. On October 28, 1988, the Utah Department of Employment Security issued its determination that Shupe was ineligible to receive benefits because he had been

discharged from his employment with Les Olson Company (hereafter also "employer"), for just cause, within the meaning of §35-4-5(b)(1), Utah Code Annotated 1953, as amended (see Appendix B).

Shupe filed an appeal and on November 21, 1988 a hearing was held before an Administrative Law Judge (hereafter also "ALJ"). In a decision dated November 29, 1988, the ALJ affirmed the Department's earlier determination (see Appendix C). On December 8, 1988, Shupe, through his attorney, Utah Legal Services, filed a further appeal to the Board of Review (hereafter also "Board"). On February 17, 1989 the Board of Review affirmed the decision of the Administrative Law Judge (see Appendix D).

Shupe then filed his Petition for Writ of Review with the Utah Court of Appeals on March 20, 1989.

STATEMENT OF FACTS

The claimant worked full time as a service technician for Les Olson Company from October 7, 1985 to September 26, 1988. Record at page 19. ("R" hereafter; all pages of the record referred to herein are set forth in Appendix E.) The claimant's job entailed going to various businesses to repair copy machines. R. 17 In the performance of his job the claimant met and interacted with company customers on a daily basis. R. 20

In October 1987 the claimant propositioned a fourteen year old donut sales boy for sex. This action occurred on the

employer's property. The father of the boy complained to the employer. The claimant was discharged as a result of this action. The claimant pled for his job and the employer reinstated the claimant under three very stringent conditions: first, that he receive professional counselling; second, the claimant was placed on probation for 90 days that in the event of any act of misconduct it would result in immediate termination; third, if any act that even resembled this type of incident occurred again in the future, claimant would be terminated immediately. R. 21-22 The claimant underwent counselling up until the time of his termination in September 1988. R. 24 He also passed the 90 day probation.

A few weeks prior to September 14, 1988, the claimant was charged by law enforcement officials for the crime of solicitation for sex or prostitution. The basis for this charge was an incident that occurred on State Street in Salt Lake City during the claimant's lunch hour. The claimant received a subpoena to appear in court to enter a plea to the charge on September 14, 1988. The claimant asked the employer for time off work giving the excuse that he had to appear in court as a witness. R. 23 The employer asked the claimant if he wished to discuss the matter. The claimant replied "No." R. 20 The employer granted the claimant's request. The claimant went to court as directed.

It was closed for a seminar. He went to the administrative offices and asked what he should do. He was told to call the court the next day and ask for another court date. The claimant did not follow the instruction and did not recontact the court to set up a new date to appear to enter a plea. R. 23

On September 26, 1988 the claimant was arrested at work for failing to appear in court as directed. On the same date, September 26, 1988 the court sent a letter to the claimant advising him that he was subject to arrest due to his failure to appear before the court and enter a plea. The claimant did not receive this letter until September 28, 1988--two days after he had been arrested. After being arrested on September 26, 1988, the claimant called the employer on the phone. He informed the employer that he had been arrested and explained the circumstances. R. 19 When he returned to work later that day he was discharged. At the time the claimant was notified that he was discharged, the employer explained the reason was an accumulation of things, the main reason being that the claimant had not been honest with the employer about what had happened and that the claimant could not be trusted with company property or with dealing with customers in a proper manner. R. 20, 22

SUMMARY OF ARGUMENT

POINT I

The judicial standards of review set forth in §63-46b-16(4) of the Utah Administrative Procedures Act (UAPA) have superceded the judicial standards of review set forth in §35-4-10(i) of the Utah Employment Security Act (UESA). The Utah Court of Appeals in the case of Grace Drilling Company v. Board of Review noted that the "substantial evidence" test under §16(4)(g) of UAPA grants appellate courts greater latitude in reviewing the record than was previously granted under the "any evidence of substance" test of UESA. In applying the "substantial evidence" test the court reviews the whole record before the court. In so doing, a court must consider not only the evidence supporting the Board's factual findings, but also the evidence that is contrary to the Board's factual findings. A party challenging the Board's findings of fact must marshall all of the evidence supporting the findings and show that despite the supporting facts, in light of the conflicting evidence, the findings are not supported by substantial evidence.

The existing intermediate standard for reviewing the Board's determinations as described in the Administrative Services case is consistent with §63-46(b)-16(4)(d) of UAPA. The intermediate standard of review has therefore not been changed

and continues to be the law and the appropriate standard of review under UESA as modified and supplemented by the enactment of UAPA.

POINT II

§35-4-5(b)(2) pertains to a situation where a claimant is discharged by an employer for dishonesty constituting a crime in connection with the claimant's work. An example would be theft or embezzlement of property belonging to the employer. Technically speaking, the phrase "not constituting a crime" in §5(b)(1) only applies to the second standard for discharge under §5(b)(1). In other words, the phrase "not constituting a crime" modifies the language "for an act or omission in connection with employment . . . which is deliberate, willful, or wanton and adverse to the employer's rightful interest . . .". It does not modify "just cause".

The language "not constituting a crime" is used in §5(b)(1) only for the purpose of distinguishing it from §5(b)(2). §5(b)(2) has a very limited application. In the instant case the crime of soliciting or patronizing a prostitute does not fit within the narrow guidelines of §5(b)(2). It does not involve dishonesty in connection with the work of the claimant of repairing copy machines. Since §5(b)(2) cannot be the applicable disqualifying provision of the statute, the facts in

the instant case must fall under the disqualification provided in §5(b)(1) of the Act.

POINT III

There were four incidents in the instant case that are so interrelated that they must be jointly considered for the purpose of applying the "in connection with employment test" of §5(b)(1) of the Act and Unemployment Insurance Rules interpreting said section. The first incident occurred in October 1987. The claimant had propositioned a fourteen year old donut boy for sex on the employer's property. The employer immediately discharged the claimant. The claimant persuaded the employer to reinstate the claimant as an employee under three very stringent conditions. The third condition was that in the event of any incident occurring in the future that even resembled the incident with the fourteen year old donut boy that the claimant would be terminated immediately.

The second incident--the solicitation incident on State Street in and of itself might not be sufficient to satisfy the "in connection with employment" requirement of §5(b)(1); however, this incident is strongly coupled with the previous incident involving the fourteen year old donut salesman. Claimant knew that the solicitation incident on State Street was the sort of thing he had been warned about the year before.

The third incident when the claimant lied to the employer regarding the reason he had to appear in court on September 14 was in connection with employment. The lie is not material except as it relates to and is coupled with the first incident involving the fourteen year old donut boy. The claimant demonstrated to the employer that he would lie to the employer regarding a legitimate inquiry of the employer as to the reason why the claimant had to take time off from work. The fourth incident when the claimant was arrested on the employer's property in and of itself would not justify a denial of benefits under §5(b)(1) except that it is a part of this whole train of events which when taken together satisfy the "in connection with employment" requirement of §5(b)(1).

POINT IV

A. CULPABILITY FACTOR

The culpability factor essential for a determination of ineligibility under §5(b)(1) of the Act has been satisfied in the instant case. The duty of honesty is inherent in any employee/employer relationship. The claimant was discharged because the employer could not trust the claimant to tell the truth and could not trust him to behave appropriately with customers as regards suggestions of a sexual nature and solicitation for sex. The

Board properly concluded this to be just cause for discharge under §5(b)(1) of the Act and applicable Unemployment Insurance Rules. The accumulation of incidents in the instant case all taken together and jointly considered satisfy the culpability factor. The conclusion of the Board of Review in this regard falls within the limits of reasonableness and rationality as per the intermediate standard of review applicable in this administrative proceeding.

B. KNOWLEDGE FACTOR

The best indication of what the claimant subjectively understood the employer warning to mean by the language "any act that even resembled this type of incident" was the incident that occurred on September 14, 1988 when the claimant lied to the employer regarding the reason why he had to appear in court. The evidence supports the finding that the claimant lied because he knew that his actions in soliciting sex on State Street were in contravention of the third condition of the warning issued by the employer and that under the terms of the warning he was in jeopardy of losing his job if the employer became aware of the pending prosecution for solicitation. Under the the applicable Unemployment Insurance Rule it was not necessary that the claimant intended to cause harm to the employer, but he certainly reasonably should have been able to

anticipate a discharge as a result of his actions under all of the facts and circumstances of this case. The conclusion of the Board of Review that the knowledge factor was satisfied in the instant case falls within the limits of reasonableness and rationality as required by the intermediate standard of review.

ARGUMENT

POINT I

IN REVIEWING A DECISION OF THE BOARD OF REVIEW, THE COURT WILL APPLY THE STANDARDS OF JUDICIAL REVIEW SET FORTH IN SUBSECTION 63-46b-16(4) OF THE UTAH ADMINISTRATIVE PROCEDURES ACT.

With the passage of the Utah Administrative Procedures Act (UAPA), the judicial standards of review set forth in §63-46b-16(4) of the UAPA have superseded the judicial standards of review set forth in §35-4-10(i) of the Utah Employment Security Act (UESA). Grace Drilling Co. v. Board of Review, 110 Utah Adv. Rep. 34 (Utah App. June 2, 1989).

§63-46b-16(4) of the UAPA provides as follows:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency;
or

(iv) otherwise arbitrary or capricious.

Grace Drilling Company v. Board of Review, supra, is the first case in which a Board of Review decision has been reviewed by the Court of Appeals under the UAPA standards of review. The Court in Grace noted certain changes in the standard of

review under UAPA from what had previously been the standard of review under UESA. The Court in Grace noted that the "substantial evidence test" under §16(4)(g) of UAPA grants appellate courts greater latitude in reviewing the record than was previously granted under the Utah Employment Security Act's "any evidence of substance test." By way of further explanation and exposition, the Court noted that "substantial evidence" is more than a mere scintilla of evidence, though something less than the weight of the evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Court further noted that in applying the "substantial evidence test," the Court reviews the whole record before the court, and this review is distinguishable from both a de novo review and the "any competent evidence" standard of review. Moreover, under the "whole record test" a Court must consider not only the evidence supporting the Board's factual findings, but also the evidence that fairly detracts from and is contrary to the Board's factual findings.

The Court further stated a new concept not formerly made a requirement incumbent upon a party challenging the Board's findings of fact and that is that such a party:

must marshall all of the evidence supporting the findings and show that despite the

supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.

The Court then stated what appears to be a similar rule to what the courts have followed in the past in regard to unemployment insurance cases, that is:

In undertaking such a review, this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review. (cases cited) It is the province of the Board, not appellate courts to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences. (case cited)

The Board of Review understands the foregoing to be the standard of review under the recently enacted Utah Administrative Procedures Act as interpreted by the Court in the Grace case supra.

In the case of Pro-Benefit Staffing, Inc. v. Board of Review, 110 Utah Adv. Rep. 3, (Utah App. June 2, 1989), the Utah Court of Appeals had occasion to address the standard of review in regard to mixed questions of law and fact under the UAPA. The Court noted that:

. . . Whether an employee was terminated for "just cause" is a mixed question of law and fact, and thus on appeal we must determine whether the UAPA alters the standard for reviewing such a determination. . . .

The Court further noted that:

Prior to the UAPA, our courts uniformly applied an intermediate standard of reasonableness and rationality in reviewing mixed questions of law and fact, otherwise referred to as the application of "basic facts . . . to the legal rules governing the case." Utah Dep't of Admin. Servs. v. Public Serv. Comm'n, 658 P.2d 601, 610 (Utah 1983). Under the intermediate standard the Board's conclusions must be reasonable and rational "as measured against the language and purpose of the governing legislation."

The Court then concluded that the existing intermediate standard for reviewing the Board's determinations as described in the Administrative Services case is consistent with the approach set forth in UAPA, §63-46b-16(4)(d). The Court indicated it intends to continue to embrace the intermediate standard analysis set forth in the Administrative Services case and that it would "not disturb the Board's application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality."

The Board of Review concludes from the foregoing that the intermediate standard of review as originally set forth in the Administrative Services case and referred to in many subsequent cases arising under the Utah Employment Security Act has not been changed and continues to be the law and the appropriate standard of review under the Employment Security Act as modified and supplemented by the enactment of the Utah Administrative Procedures Act.

POINT II

THE ADMINISTRATIVE LAW JUDGE AND BOARD OF REVIEW PROPERLY APPLIED UTAH CODE ANNOTATED SECTION 35-4-5(b)(1) IN MAKING ITS DETERMINATION THAT THE CLAIMANT WAS NOT ELIGIBLE FOR BENEFITS. SECTION 35-4-5(b)(2) WAS NOT APPLICABLE IN THE INSTANT CASE.

§§35-4-5(b)(1) and 35-4-5(b)(2) of the Utah Employment Security Act, referred to above, provide as follows:

5. 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.

(b)(2) For the week in which he was discharged for dishonesty constituting a crime in connection with his work as shown by the facts together with his admission, or as shown by his conviction in a court of competent jurisdiction of a crime in connection with that dishonesty and for the 51 next following weeks. If by reason of his alleged dishonesty in connection with his work, the individual is held in legal custody or is free on bail, any determination of his eligibility shall be held in abeyance pending his release or conviction.

§35-4-5(b)(2) pertains to a situation where a claimant is discharged by an employer for dishonesty constituting a crime

in connection with the claimant's work. An example would be theft or embezzlement of property belonging to the employer. In order for this disqualification to apply there must be a conviction of the claimant for the crime in the appropriate court or there must be an unqualified admission on the part of the claimant that he committed all of the elements of that crime. The penalty imposed under this particular disqualification is a very onerous one. It requires disqualification for the week the claimant was discharged and the 51 next following weeks. By way of comparison to §5(b)(1), a claimant discharged under §5(b)(1) can purge the disqualification and become eligible for benefits by working at a temporary subject employment and earning an amount equal to at least six times the weekly benefit amount.

§5(b)(1) presently provides that an individual is ineligible for benefits "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," etc. Prior to June 29, 1983, §5(b)(1) provided that an individual is ineligible for benefits "for the week in which the claimant was discharged for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful," etc. The amendment of §5(b)(1) effective June 29, 1983, added the words "for just cause or". "Laws of

Utah", 1983 (1st S.S.), CH. 20. Technically speaking, the phrase "not constituting a crime" only applies to the second standard for discharge under §5(b)(1) which was the standard under the law prior to the amendment adding the "just cause" provision standard. In other words, the phrase "not constituting a crime" modifies the language "for an act or omission in connection with employment . . . which is deliberate, willful, or wanton and adverse to the employer's rightful interest . . ." It does not modify "for just cause".

However, for the sake of discussion, if the phrase "not constituting a crime" did apply in a situation involving a discharge for "just cause" it still would not prevent application of §5(b)(1) in a case such as the instant case. The language "not constituting a crime" is used in §5(b)(1) only for the purpose of distinguishing it from §5(b)(2). As already mentioned, §5(b)(2) has very limited application. It only applies in the case of a conviction of a crime or the admission of the commission of a crime, which crime must involve dishonesty in connection with the work. When all of these elements are present the disqualification under §5(b)(2) applies. If all the elements are not present, then the disqualification under §5(b)(1) applies. This is the only logical construction of the phrase "not constituting a crime" in §5(b)(1). This

conclusion is fortified by Unemployment Insurance Rule R475-5b2-5.2, which provides:

. . . if there is a preponderance of evidence that the act was committed, a denial of benefits should be made under Section 35-4-5(b)(1), if charges have not been filed by the employer within four weeks. In such a case, the decision under Section 35-4-5(b)(1) will advise the claimant that a decision under Section 35-4-5(b)(2) is still pending and the 5(b)(1) disqualification will be changed to a 5(b)(2) disqualification if the claimant is found guilty by the court. If the claimant has purged a 5(b)(1) disqualification which was or could be assessed pending a ruling by the court, benefits must be held in abeyance until the court reaches a verdict. The claimant has the responsibility to provide the Department with the court's verdict in order to establish eligibility.

In the case of Clearfield City v. Department of Employment Security, 663 P.2d 440 (Utah 1983), the disqualification was assessed under §5(b)(1) of the Act because all of the elements were not satisfied so as to apply §5(b)(2). Sodomy did not come within the limitation that it must be a crime involving dishonesty in connection with the work. It therefore could not fit within the limited scope of §5(b)(2) and therefore §5(b)(1) applied. In the case of Lane v. Board of Review of Indus. Com'n, 727 P.2d 206 (Utah 1986), the claimant Lane was cited by the Parawan City Police for selling beer to a minor while acting in his capacity as assistant manager of a truck stop in Parawan. Again this act of selling beer to a minor

does not qualify as dishonesty in connection with the work and therefore it does not come within the narrow guidelines of §5(b)(2). Hence the disqualification under §5(b)(1) was applied. The Court reviewed the case under §5(b)(1) and finally determined that all of the elements necessary for a disqualification under §5(b)(1) were not satisfied and concluded the claimant was not disqualified for benefits under §5(b)(1). Benefits were allowed.

In the instant case the crime of soliciting or patronizing a prostitute does not fit within the narrow guidelines of §5(b)(2). It does not involve dishonesty in connection with the work of repairing copy machines. Therefore, as in Lane and Clearfield City, §5(b)(2) cannot be the applicable disqualification section of the statute and it must fall under the disqualification provided in §5(b)(1) of the Act.

In the Lane case the Court noted that the claimant was cited for the crime of selling beer to a minor. The decision does not disclose whether or not the claimant was ever convicted of the crime. It was not necessary to determine whether the claimant was convicted or not in order to decide that §5(b)(1) applied. As noted above the crime of selling beer to a minor did not fit within the guideline of dishonesty in connection with the work required to come within §5(b)(2). Therefore, it was readily determined that §5(b)(1) applied without the

necessity for a verdict of guilty or innocent in a criminal court to determine whether §5(b)(2) applied.

It is submitted that the "not constituting a crime" clause in §5(b)(1) of the Act must be read as though it expressly stated "not constituting a crime for which the claimant was disqualified for benefits under §5(b)(2) of this Act."

POINT III

THE CLAIMANT'S CONDUCT WAS SUFFICIENTLY CONNECTED TO HIS EMPLOYMENT TO JUSTIFY A DENIAL OF UNEMPLOYMENT INSURANCE BENEFITS UNDER SECTION 35-4-5(b)(1) OF THE ACT.

The conduct of the claimant which was the basis for and cause of his discharge was first: the incident that occurred in October 1987, which involved a complaint by the father of a fourteen year old boy who sold donuts. The employer's witness testified that the claimant was very reluctant to discuss what had actually happened regarding the incident with the fourteen year old donut salesman until he realized that his job was on the line. At that point the claimant ". . . finally discussed what actually he had said . . ." R. 22 Based upon information received from the claimant and from the father of the fourteen year old donut salesman, the employer concluded that the claimant had propositioned the boy for sex on the employer's property. When the employer ascertained these facts

the decision was made to terminate the claimant. R. 21 The claimant "literally pled to the company for his job" R. 21 The employer changed his mind and the claimant was reinstated as an employee provided that he strictly comply with three conditions imposed by the employer. The first condition was that "he receive counselling for it." The second condition was that the claimant "was placed on probation for 90 days that if any act of misconduct we indicated to him that he would be terminated." The third condition was a warning "that if any act that even resembled this type of incident occurred again in the future, he would be terminated immediately." R. 21

The second incident which was the basis for claimant's discharge was the incident of solicitation for sex or prostitution that occurred on State Street of Salt Lake City sometime prior to September 14, 1988. R. 23 This incident occurred during the claimant's lunch hour. At the time the claimant was not on the premises of the employer or of any customer of the employer.

The third incident occurred at the employer's place of business on September 14, 1988. R. 20 At that time the claimant requested time off from work to appear in court as a witness. The claimant lied to the employer in regard to the reason why he had to appear in court. The actual reason for his appearance in court was to enter a plea in the criminal

case referred to above, where he was the defendant. The fourth incident which was a basis for the discharge occurred on September 26, 1988 when the claimant was arrested in the company parking lot in connection with the criminal charge already referred to.

Unemployment Insurance Rule R475-5b1-7 defines the phrase "in connection with employment" as used in §35-4-5(b)(1). It provides:

R475-5b1-7. In Connection with Employment

Disqualifying conduct is not limited to offenses which take place on the employer's premises or during business hours. It is only necessary that the conduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer. All employers, both public and private have the right to expect employees to refrain from acts which are detrimental to the business or would bring dishonor on the business name or the institution. Legitimate interests of employers include, but are not limited to: goodwill of customers, reputation of the business, efficiency, business costs, morale of employees, discipline, honesty, trust and loyalty.

This Rule is derived at least in part from the decision in the Clearfield City case supra, which provides:

States with similar statutes have held that "connection with employment" is not limited to misconduct "which occurred during the hours of employment and on the employer's

premises." (Cases cited) It is only necessary that the misconduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer.

The first incident referred to above as one of the bases for discharge involving the fourteen year old boy selling donuts occurred during the hours of employment and on the employer's premises. It was therefore clearly in connection with employment. The second incident--the solicitation for sex on State Street was unquestionably a matter of legitimate and significant concern to the employer. The employer had previously discharged the claimant over the incident involving solicitation of the fourteen year old boy because of the employer's very real and understandable concern over the effect such actions would have on the goodwill of customers, the reputation of the business, the morale of the other employees, and the honesty and trustworthiness of the claimant. The employer, after much soulsearching decided to reinstate the claimant. In doing so the employer took steps to protect itself against further actions by the claimant that could adversely affect the reputation of the business, the goodwill of customers and the morale of the other employees. The employer required the claimant to obtain professional help (counselling) so as to avoid recurrence of such behavior. Also the employer sought to protect itself

from further damage by the claimant to its business interests by warning the claimant he would be immediately terminated in the event of any future act that even resembled the type of incident with the fourteen year old boy. This warning was given not so much to justify a future discharge of the claimant as it was given for the purpose of avoiding any respondeat superior liability and of deterring the claimant from doing acts that would be harmful to the goodwill of customers and the reputation of the employer and the employer's business interests in general. R. 22

The solicitation incident on State Street in and of itself might not be sufficient to satisfy the "in connection with employment" requirement of §5(b)(1). In this regard see Raymond O. Benaske v. General Telephone Company of Michigan and Michigan Employment Security Board of Review, CCH Unemployment Insurance Reporter, Mich. ¶9621; and Andrea L. Mason v. Board of Review, CCH Unemployment Insurance Reporter, Pa. ¶11814. The solicitation incident on State Street however is strongly coupled with the previous incident involving the fourteen year old donut salesman. The claimant had been given an ultimatum that any act in the future that even resembled the type of incident with the fourteen year old donut salesman would result in immediate termination. The claimant knew that the solicitation incident on State Street was the sort of thing he had been

warned about the year before. The claimant's attorney in his opening statement said:

. . . John lied to them. He told them that he was supposed to be there as a witness. And this doesn't justify that lie, John felt that this thing wasn't connected to his work and also, just the sort of social disapproval surrounding that sort of thing, especially a, com-, what had happened the year before, he had the feeling that he, that he would be fired if he told them, so he told them he was going to be there as a witness. R. 18

It is the connection with the prior incident which clearly makes the solicitation incident on State Street an action "in connection with employment" pursuant to §5(b)(1) of the Act.

The third incident when the claimant lied to the employer regarding the reason why he had to appear in Court on September 14, 1988 was in connection with employment. The purpose of the lie was not to obtain time off from work which he would not have been entitled to if he told the truth. If the claimant had told the supervisor that he needed time off because he had been ordered by the court to appear and enter a plea to a criminal charge pending against him the employer would have been hard put to deny his request. So the lie is not material except as it relates to and is coupled with the first incident involving propositioning the fourteen year old donut boy for sex. The purpose of the lie as already indicated was to avoid informing the employer that the claimant was again involved

with an unlawful solicitation for sex situation. The claimant thought the employer would consider it to be a violation of the third condition imposed by the employer at the time the employer reinstated the claimant as an employee after having separated the claimant over the donut boy incident. The inescapable conclusion of the employer was that in spite of the professional counselling which the claimant has received as a condition of reinstatement in employment, the employer could not trust the claimant to avoid further incidents of criminal solicitation of sex. Furthermore, the employer could not trust the claimant to be honest with the employer as regards his involvement in such activities as it related to the performance of the claimant's work duties. The claimant demonstrated that he would lie to the employer regarding a legitimate inquiry of the employer as to the reason why he had to take time off from work to cover up the fact of his involvement in an activity which was contrary to the third condition of continuing employment imposed by the employer.

The fourth incident wherein the claimant was arrested in the company parking lot on September 26, 1988 was partly the fault of the claimant and partly the fault of the court. R. 23 When the claimant appeared in court on September 14, he was informed he should call the court the next day to set a new date for him to appear to enter his plea. The claimant failed

to call the court the next day and acknowledged at the hearing that his failure to do so "was probably my, my single greatest mistake in this whole affair because if I had called and if I had set up another date, I could've probably taken care of this whole incident without involving my company or the police . . ."

R. 25 The court then sent a letter to the claimant dated the same date that he was arrested, September 26, 1988, informing the claimant that because he had failed to appear in court that he was subject to arrest. The claimant received this letter two days later on September 28, two days after he was arrested. As noted by the claimant, he obviously had no chance to act on the letter from the court dated September 26.

The presence of the officer on the employer's property was somewhat disruptive of the employer's operations. It caused considerable stir, talk and inquiry among the employees. The claimant's arrest and processing with the court took the claimant away from work for a substantial part of the day and caused the employer disruption and inconvenience insofar as the claimant's non-attendance resulted in such. As noted by the claimant he could have avoided this whole episode of arrest at the place of his employment if he had not been involved in the solicitation on State Street in the first place and if he had called the court on the 15th of September to make an appointment for another date to appear as he had been instructed.

The arrest incident in and of itself would not justify a denial of benefits under §5(b)(1) of the Act. However, it is a part of this whole train of events which when taken together satisfy the "in connection with employment" requirement of §5(b)(1). It was his arrest which alerted the employer to the fact that the claimant had lied to him about the reason for his absence from work on September 14, and also the claimant was again involved in solicitation of sex in contravention of the condition of his reinstatement in employment instituted at the time of the donut boy incident. It is submitted that all of the foregoing incidents are so interrelated that they must be jointly considered for the purpose of applying the "in connection with employment" test of §5(b)(1) and Unemployment Insurance Rule R475-5b1-7, interpreting and defining this requirement.

It is submitted in view of the situation as a whole it was proper for the ALJ and Board of Review to conclude that the claimant's actions were detrimental to the business or would bring dishonor on the business name. They adversely affected the goodwill of customers, the reputation of the business, the morale of fellow employees, and in the words of the Board of Review, "very substantially adversely affected the employer's ability to trust the claimant." R. 54 The conclusions of the ALJ and Board of Review are reasonable and rational as per the intermediate standard of review (see POINT I, supra).

POINT IV

THE DECISION OF THE BOARD OF REVIEW THAT THE CULPABILITY AND KNOWLEDGE FACTORS HAVE BOTH BEEN SATISFIED IN THE INSTANT CASE SUCH AS TO JUSTIFY A DENIAL OF BENEFITS UNDER §35-4-5(b)(1) OF THE ACT FALLS WITHIN THE LIMITS OF REASONABLENESS AND RATIONALITY AS REQUIRED BY THE INTERMEDIATE STANDARD OF REVIEW PERTAINING TO ADMINISTRATIVE PROCEEDINGS.

The Respondent is in agreement with the statement in the Appellant's brief that the question of control is not at issue in the instant case and that only the culpability and knowledge factors are at issue in this case. The Respondent will address only the culpability and knowledge factors in its brief.

The Unemployment Insurance Rules interpreting §5(b)(1) of the Act, provide that:

The basic factors which establish just cause, and are essential for a determination of ineligibility are:

a. Culpability, b. Knowledge, and c. Control.

A. CULPABILITY FACTOR.

Unemployment Insurance Rule R475-5b1-2.1.a. defines the culpability factor as follows:

a. Culpability

This is the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to

avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices. The 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.

The ALJ in her decision held that the claimant's:

. . . actions toward the fourteen year old and his subsequent citation for solicitation shrouded the employer's ability to trust him to behave in a socially acceptable manner. The employer's reason for discharge was that the company's trust level in the claimant had eroded. . . . Since the claimant's behavior shrouded the employer's trust, the company acted reasonably by separating him.

The Board of Review in affirming the decision of the ALJ also noted that the employer's inability to trust the claimant was the basis for the discharge and constituted "just cause" under §5(b)(1). The Board in its decision stated:

. . . the claimant's actions toward the fourteen year old boy on the employer's premises, his subsequent citation for solicitation, and his failure to report to the employer that the reason he had to go to court was not to act as a witness but to appear as a defendant on a criminal charge of solicitation, very substantially adversely affected the employer's ability to trust the claimant. It affected the employer's ability to trust the claimant in

general and also to trust the claimant to behave in the future in a manner such as not to harm the reputation of the employer; or to harm the relationship of the employer with its customers; or to possibly render the employer liable in damages for the claimant's misconduct directed toward customers or other employees of the employer or other third parties dealing with the employer and coming in contact with the claimant.

The Appellant, in its brief on page 12 refers to the case of Kehl v. Board of Review of Industrial Commission, 700 P.2d 1129 (Utah 1985). The Kehl case involved transporting thousands of pounds of explosives over a train track without complying with the employer's safety rules prior to actually crossing the track with the explosives. Claimant notes that in Kehl the act of transporting the explosives over the train tracks in disregard of the employer's safety policies:

. . . shows a reckless disregard for the company rules and an imminent danger to human lives . . . Kehl's act could have cost her employer, Hercules, several hundreds of thousands of dollars, as well as cost Hercules its excellent reputation in the community. Shupe's conduct cost his employer nothing. (Brief of Appellant, page 13.)

The claimant also refers to the case of Clearfield City v. Department of Employment Security, supra, on page 14 of its brief. In this case a policeman for Clearfield City also worked part time as a counselor at the Clearfield Job Corp Center which is located in the City of Clearfield. This

police officer engaged in an act of sodomy with a twenty-two year old female student at the Job Corp Center. The case was widely publicized in the community.

It is not necessary that the potential damage to an employer be of such major ramification and involve the possible loss of hundreds of thousands of dollars and possible loss of human life and potential catastrophic devastation of property as in the Kehl case in order to satisfy the culpability factor under §5(b)(1) of the Act. Nor is it necessary that the offense of a claimant be so notorious and sensational as was the act of sodomy engaged in by the police officer in the Clearfield case in order to satisfy the culpability factor.

Unemployment Insurance Rule R475-5b1-8 sets forth several examples of reasons for discharge. The examples given which do not include all reasons for discharge, are: violation of company rules, attendance violations, falsification of work record, insubordination and loss of license. Attendance violations are certainly not as spectacular as the violations in the Kehl case and the Clearfield City case. However, they do constitute just cause. Rule R475-5b1-8.2 points out that:

. . . Such violations [attendance violations] are generally a serious matter of concern to employers as attendance standards are necessary to maintain order, control, and productivity.

The "falsification of work records" example is the one most closely related to the instant case. It provides:

The duty of honesty is inherent in any employee/employer relationship. A statement made in an application for a job may be considered as connected with the work, even though it is made before the work begins. An individual begins his obligations as an employee when he makes an application for work. One of those obligations is to give the employer truthful answers to all material questions. Any falsification of information which may operate to expose the employer to possible loss, litigation, or damage would be considered material and therefore may establish culpability. If the claimant made a false statement while applying for work in order to be hired, benefits may be denied, even if the claimant would have otherwise remained unemployed and eligible for the receipt of unemployment benefits depending upon the degree of knowledge, culpability and control.

As the rule points out, the duty of honesty is inherent in any employee/employer relationship. It is the obligation of an employee to give the employer truthful answers to all material questions. The basis of both the ALJ's decision and the Board of Review's decision was the employer's inability to trust the claimant in general and also to trust the claimant to behave in the future in a manner such as not to harm the reputation of the employer or to harm the relationship of the employer with its customers or to possibly render the employer liable in damages for the claimant's misconduct directed toward

customers, other employees, or other third parties dealing with the employer and coming in contact with the claimant.

As noted in POINT III the claimant demonstrated that he would lie to the employer regarding a legitimate inquiry of the employer as to the reason why he had to take time off from work in order to cover up the fact of his involvement in an activity involving solicitation for sex. The employer was concerned that the claimant goes out to service copiers and is around customers. They were worried about him making inappropriate comments while with customers. It was a serious matter of concern. R. 9 The employer could not trust the claimant to tell the truth and could not trust him to behave appropriately with customers as regards suggestions of a sexual nature and solicitation for sex such as what occurred with the fourteen year old donut boy and solicitation for sex and prostitution as occurred in the incident resulting in the filing of criminal charges.

The rule regarding falsification of a work record also stresses that actions by an employee "which may operate to expose the employer to possible loss, litigation, or damage would be considered material and therefore may establish culpability." That was one of the major concerns in the instant case. The employer's witness testified:

. . . we didn't feel like we could afford
the potential liability that we might have

because if he was, if these types of acts were occurring again, we didn't know whether he might be in a customer's office at some point in time and, uh, do something inappropriate there. We just didn't feel like we could take that liability. . . .

The employer testified that the claimant was separated for:

. . . an accumulation of things, the main reason being that, uh, he wasn't honest with me about what had happened. . . . I just felt like if he'd lied to me about this kind of thing, what else might he lie to me about. . . ." R. 20

The employer was referring to when the claimant lied that he had to appear in court as a witness. It was the combination of the four incidents referred to in POINT III that were the bases of the discharge and which altogether satisfied the culpability factor and constituted just cause for the discharge. The Court in Grinnell v. Board of Review, 732 P.2d 113 (Utah 1987), had before it a similar situation involving an accumulation of causes giving rise to a discharge. The Court noted:

The Board of Review reversed, finding that Grinnell was terminated for all of the policy violations and that the drug use was a violation that according to the employer "broke the camel's back".

The Court in Grinnell held:

Two witnesses for the employer testified that it was the cumulative affect of Grinnell's violations of company policy that led to his discharge, and the Board's

findings are therefore not arbitrary and capricious.

It is submitted that the instant case is in accord with the decision in the Grinnell case. The accumulation of the incidents starting with the solicitation of the fourteen year old donut boy, the solicitation for sex or prostitution that occurred a year later, the lying to the employer to cover up the fact that the claimant had been charged in a criminal proceeding for the solicitation incident on State Street, and finally the incident when the claimant was arrested at work due to the fact that he had failed to reschedule a date for his appearance to enter a plea in the criminal case, all taken together and jointly considered satisfy the culpability factor. In any event it could not be said that the conclusion of the Board of Review that the culpability factor has been satisfied in the instant case does not fall within the limits of reasonableness and rationality as per the intermediate standard of review applicable in this administrative proceeding. (See POINT I, supra.)

B. KNOWLEDGE FACTOR

Unemployment Insurance Rule R475-5b1-2.1.b explains the knowledge factor as follows:

b. Knowledge

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

The claimant contends on page 16 of his brief that when he was given the warning in 1987 as a result of the incident with the fourteen year old donut boy, there was no explanation given that any kind of solicitation whatsoever, whether on company property or not, whether during working hours or not, or whether to a minor or not, would be reprehensible to the company. Therefore the claimant could not be expected to know that his nonwork-related conduct was violative of company policy.

By way of response to the foregoing contention of the claimant, the employer testified that the claimant was warned

in regard to the donut boy incident that "if any act that even resembled this type of incident occurred again in the future, he would be terminated immediately." The question then is what did the claimant subjectively understand the employer to mean by "any act that even resembled this type of incident." The best indication of this is the incident that occurred on September 14, 1988 at the time the claimant requested time off from work to appear in court as a witness. When asked why he had to go to court the claimant lied to the employer and did not disclose that he had been picked up and charged for solicitation of sex or prostitution. The claimant's attorney explained that the reason the claimant lied was that "he had the feeling that he, that he would be fired if he told them, so he told them he was going to be there as a witness." R. 18 (Also see POINT III, supra, page 27). The claimant testified that he lied to the employer stating that he had to appear in court as a witness as follows:

Now, when I went to court that day, I told my boss, Jim Olson, that I had to appear as a witness. Obviously, that's not true, but I said that because I didn't really want to tell him what was really going on because I felt that I could take care of it and it would be out of the way and no one really had to know about it. Um, in hindsight, I almost, you know, could've just as easily said I had a doctor's appointment or something rather than have to explain why I have to go to court but I really didn't want to lie to them, you know, I, I felt

that, you know, having to go to court was a bad enough deal and for me to have to lie and say that I was doing something else would just be making it worse, so I told Jim I had to go to court but I said it was as a witness. R. 23

The claimant in his appeal to the ALJ stated "I know I was half truthful in a matter involving a court appearance . . ."

R. 11 The claimant does not specifically state why he lied to the employer. It seems clear that he felt it was necessary not to disclose to the employer the fact that he had been involved in solicitation of sex or prostitution. The claimant wanted to keep his lies to a minimum and therefore he just lied about the reason he was to go to court rather than using the excuse he had a doctor's appointment which would have been a total lie rather than a half truth. The evidence supports a finding that the claimant lied because he knew that his actions in soliciting sex were in contravention of the third condition of the warning and that under the terms of the warning he was in jeopardy of losing his job if the employer became aware of the pending prosecution for solicitation.

It is submitted that the various elements of the Department rule pertaining to the knowledge factor have all been satisfied. The claimant knew that the act of solicitation which gave rise to the criminal proceeding against him was conduct which the employer had specifically warned him it would

not tolerate. As the Department Rule states, it was not necessary that the claimant intended to cause harm to the employer but he certainly reasonably should have been able to anticipate a discharge as a result of his actions. The conclusion of the Board of Review and the ALJ that the knowledge factor as set forth in Department Rules was satisfied in the instant case, falls within the limits of reasonableness and rationality as required by the intermediate standard of review enunciated in the Utah Department of Administrative Services v. Public Service Commission case, referred to in POINT I, supra., and held to be still applicable under the Utah Administrative Procedures Act in the Pro-Benefit Staffing case, also referred to in POINT I, supra.

CONCLUSION

The findings of fact of the Board of Review are supported by substantial competent evidence. The conclusions of law of the Board of Review fall within the limits of reasonableness and rationality as measured by the statutory language, purpose and policy. The decision of the Board of Review affirming the decision of the ALJ, holding that the claimant, John P. Shupe, has been discharged from his employment with the employer for disqualifying conduct pursuant to §35-4-5(b)(1) of the Act, is consistent with the requirements of the Act, the Rules of

the Department of Employment Security, and precedent decisions of the Utah Supreme Court and Utah Court of Appeals. The decision should, therefore, be affirmed.

Respectfully submitted this _____ day of July, 1989.

R. PAUL VAN DAM
Attorney General

WINSTON M. FAUX
Special Assistant
Attorney General

By _____
Winston M. Faux
Attorney for Respondents
Board of Review

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed four copies of the foregoing Respondents' Brief, postage prepaid, to the following: Ward Harper, UTAH LEGAL SERVICES, INC., Attorney for the Petitioner, John P. Shupe, 124 South 400 East, #400, Salt Lake City, Utah 84111; and Scott Olson, Les Olson Company, Employer-Respondent, P. O. Box 65677, Salt Lake City, Utah 84165-0677, this _____ day of July, 1989.

§35-4-5(b)(1), Utah Code Annotated 1953, as amended, provides as follows:

5. 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.

Unemployment Insurance Rules of the Department of Employment Security, R475-5b1-1, R475-5b1-2, R475-5b1-7 and R475-5b1-8 provide in pertinent part as follows:

R475-5b1-1. General Definition

Ordinarily accepted concepts of justice are used in determining if a discharge is disqualifying under the "just cause" provisions of the Act. Just cause is defined as a job separation that is necessary due to the seriousness of actual or potential harm to the employer provided the claimant had knowledge of the employer's expectations and had control over the circumstances which led to the discharge. Just cause is not established if the reason for the discharge is baseless, arbitrary or capricious or the employer has failed to uniformly apply reasonable standards to all employees when instituting disciplinary action. The purpose of this section is to deny benefits

to individuals who bring about their own unemployment by conducting themselves, with respect to their employment with callousness misbehavior, or lack of consideration to such a degree that the employer was justified in discharging the employee. However, when an employee is discharged by his employer, such discharge may have been the result of incompetence, lack of skill, or other reasons which are beyond the claimant's control. The question which must be established by the evidence is whether the claimant is at fault in his resulting unemployment. Unemployment insurance benefits will be denied if the employer had just cause for discharging the employee. However, not every cause for discharge provides a basis to deny benefits. In order to have just cause for discharge pursuant to Section 35-4-5(b)(1) there must be some fault on the part of the employee involved.

R475-5b1-2. Just Cause

1. The basic factors which establish just cause, and are essential for a determination of ineligibility are:

a. Culpability

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

. . .

b. Knowledge

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

(1) For Example: When the employer has an established procedure of progressive discipline, such procedures generally must have been followed in order to establish that the employee had knowledge of the expected behavior or the seriousness of the act. The exception is that very severe conduct, such as criminal actions, may justify immediate discharge without following a progressive disciplinary program.

c. Control

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

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

3. The term "just cause" as used in Section 5(b)(1) does not lessen the requirement that there be some fault on the part of the employee involved. Prior to the 1983 addition of the term "just cause" the Commission interpreted Section 5(b)(1) to require an intentional infliction of harm or intentional disregard of the employer's interests. The intent of the Legislature in adding the words "just cause" to Section 5(b)(1) was apparently to correct this restrictive interpretation. While some fault must be present, it is sufficient that the acts were intended, the consequences were reasonably foreseeable, and that such acts have serious effect on the employee's job or the employer's interests.

R475-5b1-7. In Connection with Employment

Disqualifying conduct is not limited to offenses which take place on the employer's premises or during business hours. It is only necessary that the conduct have such "connection" to the employee's duties and to the employer's business that it is a subject of legitimate and significant concern to the employer. All employers, both

public and private have the right to expect employees to refrain from acts which are detrimental to the business or would bring dishonor on the business name or the institution. Legitimate interests of employers include, but are not limited to: goodwill of customers, reputation of the business, efficiency, business costs, morale of employees, discipline, honesty, trust and loyalty.

R475-5b1-8. Examples of Reasons for Discharge.

In all the following examples, the basic elements of just cause must be considered in determining eligibility for benefits. The following examples do not include all reasons for discharge.

1. Violation of Company Rules

If an employee violates reasonable rules of the employer and the three elements of culpability, knowledge and control are established, benefits must be denied.

a. The reasonableness of the employer's rules will depend on the necessity for such a rule as it affects the employer's interests. Rules which are contrary to general public policy or which infringe upon the recognized rights and privileges of individuals may not be reasonable. An employer

must have broader prerogatives in regulating conduct when employees are on the job than when they are not. An employer must be able to make rules for employee on-the-job conduct that reasonably further the legitimate business interests of the employer. An employer is not required to impose only minimum standards, but there may be some justifiable cause for violations of rules that are unreasonable or unduly harsh, rigorous or exacting. When rules are changed, adequate notice and reasonable opportunity to comply must be afforded. If the employee believes a rule is unreasonable, he has the responsibility to discuss his concerns with the employer and give the employer an opportunity to take corrective action.

b. Discharges may be regulated by an employment contract or collective bargaining agreement. Just cause for the discharge is not established if the employee's conduct was consistent with his rights under such contract or the discharge was contrary to the provisions of such contract.

c. Habitual offenses may not be disqualifying conduct if it is found that the act was condoned by the employer or was so prevalent as to be customary. However, when the worker is given notice that the conduct will no longer be tolerated, further violations could result in a denial of benefits.

d. Culpability may be established even if the result of the violation of the rule does not in and of itself cause harm to the employer, but the resultant lack of compliance with rules diminishes the employer's ability to have order and control. Culpability is established if termination of the employee was required to maintain necessary discipline in the company.

e. Knowledge of the employer's standards of behavior is usually provided in the form of verbal instructions, written rules and/or warnings. However, the warning is not always necessary for a disqualification to apply in cases of violations of a serious nature of universal standards of conduct of which the claimant should have been aware without being warned.

2. Attendance Violations

a. It is the duty of the worker to be punctual and remain at work within the reasonable requirements of the employer. Discharge for unjustified absence or tardiness is considered disqualifying if the worker knows that he is violating attendance rules. Such violations are generally a serious matter of concern to employers as attendance standards are necessary to maintain order, control, and productivity. Discharge for an attendance violation beyond the control of the worker is not disqualifying unless the worker reasonably could have given notice or obtained permission consistent with the employer's rules.

b. In cases of termination for violations of attendance standards, the employee's recent history of attendance shall be considered to determine if the violation is an isolated incident, or demonstrates a pattern of unjustified absences within the control of the employee. Flagrant misuse of attendance privileges may result in a denial of benefits even if the last incident was beyond the employee's control.

3. Falsification of Work Record

a. The duty of honesty is inherent in any employee/employer relationship. A statement made in an application for a job may be considered as connected with the work,

even though it is made before the work begins. An individual begins his obligations as an employee when he makes an application for work. One of those obligations is to give the employer truthful answers to all material questions. Any falsification of information which may operate to expose the employer to possible loss, litigation, or damage would be considered material and therefore may establish culpability. If the claimant made a false statement while applying for work in order to be hired, benefits may be denied even if the claimant would have otherwise remained unemployed and eligible for the receipt of unemployment benefits depending upon the degree of knowledge, culpability and control.

4. Insubordination

Authority is required in the work place to maintain order and efficiency. An employer has the right to expect that lines of authority will be maintained; that reasonable orders, given in a civil manner, will be obeyed; that supervisors will be respected and that their authority will not be undermined. In determining when insubordination (resistance to authority) becomes disqualifying conduct, the fact that there was a disregard of the employer's interests is the major importance. Mere protests or dissatisfaction without an overt act is not in disregard of the employer's interests. However, provocative remarks to a superior or vulgar or profane language in response to a civil request may be insubordination if it is conducive to disruption of routine, negation of authority and impairment of efficiency. Mere incompatibility or emphatic insistence or discussion by an employee who was acting in good faith is not disqualifying conduct.

5. Loss of License

When an employee loses a license which he knows is required for the performance of the job, and the individual had control over the circumstances which resulted in the loss of the license, such conduct is disqualifying. For example, if the claimant worked as a driver, and lost his license because of a conviction for driving under the influence (DUI), culpability is established if he fails to obtain a permit to drive at work or the conviction would expose the employer to additional liabilities. The employer cannot authorize an employee to drive in violation of the law. Also, additional insurance costs or other liabilities are a legitimate concern of the employer. Knowledge is established because it is a matter of common knowledge in the State of Utah that driving under the influence of alcohol is a violation of the law and is punishable by loss of the individual's driving privileges. Judicial notice can be taken of this fact because a question relative to this matter is on every driver's license test. He had control in that he made a conscious decision to risk loss of the license when he failed to make arrangements for transportation prior to becoming under the influence of intoxicants.

§35-4-5(b)(2), Utah Code Annotated 1953, as amended, provides as follows:

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

(b)(2) For the week in which he was discharged for dishonesty constituting a crime in connection with his work as shown by

the facts together with his admission, or as shown by his conviction in a court of competent jurisdiction of a crime in connection with that dishonesty and for the 51 next following weeks. If by reason of his alleged dishonesty in connection with his work, the individual is held in legal custody or is free on bail, any determination of his eligibility shall be held in abeyance pending his release or conviction.

Unemployment Insurance Rules of the Department of Employment Security, R475-5b2-5, provides as follows:

R475-5b2-5. Benefits Held in Abeyance

1. If the claimant has not made an admission, but is held in legal custody or free on bail, the law requires a withholding of a determination of eligibility. Benefits cannot be paid unless a determination of eligibility is made. Failure to pay benefits even though the burden of proof for a denial under Section 5(b)(2) has not been met is justified because the court, in holding the claimant in legal custody or establishing bail has made a preliminary ruling that the state has established that a crime has been committed and there is reason to believe the individual committed that crime. The filing of charges is not the same as being held in custody.

2. However, if there is a preponderance of evidence that the act was committed, a denial of benefits should be made under Section 35-4-5(b)(1), if charges have not been filed by the employer within four weeks. In such a case, the decision under Section 35-4-5(b)(1) will advise the claimant that a decision under Section 35-4-5(b)(2) is still pending and the 5(b)(1) disqualification shall be changed to a 5(b)(2)

disqualification if the claimant is found guilty by the court. If the claimant has purged a 5(b)(1) disqualification which was or could be assessed pending a ruling by the court, benefits must be held in abeyance until the court reaches the verdict. The claimant has the responsibility to provide the Department with the court's verdict in order to establish eligibility.

. . .

§35-4-10(i), Utah Code Annotated 1953, as amended, provides as follows:

10(i) Within ten days after the decision of the board of review has become final, any aggrieved party may secure judicial review by commencing an action in the supreme court against the board of review for the review of its decision in which action any other party to the proceeding before the board of review shall be made a defendant. In that action a petition which need not be verified but must state the grounds upon which a review is sought shall be served upon a member of the board of review or upon that person the board of review designates and service is deemed completed service on all parties but there shall be left with the party served as many copies of the petition as there are defendants and the board of review shall mail one copy to each defendant. With its answer, the board of review shall certify and file with the court all documents and papers and a transcript of all testimony taken in the matter together with its findings of fact and decision.

§63-46b-16(4), Utah Code Annotated 1953 (1988 Replacement Volume), provides as follows:

(4) The Appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking

judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

§78-2a-3(2)(a), Utah Code Annotated 1953, as amended, provides in pertinent part as follows:

78-2a-3. Court of Appeals Jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final order and decrees of state and local agencies . . .

C 589 # 1325

FORM 615-J
REV. 10/85

UTAH DEPARTMENT OF EMPLOYMENT SECURITY

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DISTRIBUTION:
#1-CL #2-CO

DECISION OF ELIGIBILITY FOR
UNEMPLOYMENT INSURANCE BENEFITS

**** EMPLOYER NOTIFIED ****

EMPLOYER NAME
LES OLSON COMPANY

SOC. SEC. #228-78-6159

NAME AND ADDRESS OF CLAIMANT

OFFICE ADDRESS

JOHN P SHUPE
8592 WASATCH BLVD
SALT LAKE CY UT 84121

Salt Lake Claims
1234 South Main St.
Salt Lake City, Utah 84101

NOTICE: THIS DECISION IS MADE ON YOUR CLAIM FOR BENEFITS:

You were discharged from your job for insubordination or for inappropriate behavior which was in conflict with your employer's rightful interests.

You were discharged from your job for just cause. Your conduct was within your control and was adverse to your employer's rightful interests. You had knowledge of your responsibilities to your employer or his expectations and you knew or should have known the possible adverse effects of your conduct on your employer.

Benefits are denied under Section 35-4-5(b)(1) of the Utah Employment Security Act beginning OCTOBER 02, 1988 and ending when you have earned wages in bona fide covered employment equal to at least six times your weekly benefit amount and you are otherwise eligible. You must provide proof of these earnings when you report to Job Service to reopen your claim.

RIGHT TO AN INTERVIEW-- If this decision was based upon written information only, you have the right to an in-person interview in a Utah Job service office within 10 calendar days of the date mailed. If you are filing through an office in another state, you may appeal as explained below but you cannot be guaranteed an interview on this decision.

RIGHT TO REDETERMINATION OR APPEAL-- You may request a redetermination or explanation of this decision from the nearest Utah Job Service office within 10 calendar days. If you believe this decision is incorrect, you have 10 calendar days from the date mailed to file an appeal. Your appeal may be filed in person or by mail to the nearest Job Service office or to: Appeals Section; P.O. Box 11600; Salt Lake City, Utah 84147. **YOUR APPEAL MUST SHOW THE DATE MAILED, YOUR NAME AND SOCIAL SECURITY NUMBER AND STATE THE GROUNDS FOR YOUR APPEAL AND THE RELIEF YOU ARE REQUESTING.**

DATE MAILED 10/28/88 REPR. D: Jacobs

EMP. # 4308 L.O. 21

EXHIBIT 7

THE INDUSTRIAL COMMISSION OF UTAH
DEPARTMENT OF EMPLOYMENT SECURITY

Appeals Tribunal

Decision of Administrative Law Judge

John P. Shupe	:	S.S.A. No. 228-78-6159
8592 Wasatch Boulevard	:	
Salt Lake City, Utah 84121	:	Case No. 88-A-04980

APPEAL FILED: November 2, 1988

DATE OF HEARING: November 21, 1988

APPEARANCES: Claimant
Claimant's Counsel
Employer

PLACE OF HEARING: Salt Lake City, UT

The Department's decision dated October 28, 1988, denied the payment of unemployment insurance benefits effective October 2, 1988, and allowed the employer relief of charges on the grounds the claimant was discharged for just cause. Section 35-4-5(b)(1) and 35-4-7(c)(3)(F) of the Utah Employment Security Act are quoted on the attached sheet.

Jurisdiction for this review is established in accordance with Section 35-4-6(c) of the Utah Employment Security Act and the Rules pertaining thereto.

FINDINGS OF FACT:

Prior to filing for unemployment insurance benefits effective October 2, 1988, the claimant worked full time as a service technician for Les Olson Company from October 7, 1985 to September 26, 1988. The claimant was discharged for the reasons set forth as follows.

The claimant's job entailed going to various businesses to repair copy machines. Service technicians are entrusted with company money and expensive parts. They meet and interact with company customers on a daily basis. The company expects trustworthiness and integrity from its employees.

In October 1987, the claimant propositioned a fourteen year old doughnut sales person for sex. This was done on company property. The father of the boy filed a complaint. The claimant was discharged as a result but was rehired under three conditions. First, he was placed on a 90 day probation. Second, he was to seek counseling. Third, he was warned if he engaged in any similar activity, he would be discharged.

The claimant passed probation. He underwent counseling for at least a year.

A few weeks before discharge, the claimant was charged for solicitation. The incident occurred on State Street during his lunch hour.

The claimant received a subpoena to appear in court on September 14, 1988, to enter a plea. The claimant asked for time off work, explaining he had to appear in court as a witness. The employer asked the claimant if he wished to discuss the matter. The claimant stated "No". The claimant was given permission to leave. He went to court as directed. It was closed for a seminar. He went to the administrative offices and asked what he should do. He was told to call the court the next day and to ask for another court date. The claimant did not re-contact the court for a new date. The court sent a letter to the claimant advising him to reschedule. He did not receive this letter until September 28, 1988. On September 26, 1988, the claimant was arrested at work for allegedly failing to appear in court as directed.

At approximately 11:00 a.m. on September 26, 1988, the claimant called the company for the second time that morning. He informed the employer he had been arrested. He explained the circumstances. When he reported to work later that day, he was discharged.

REASONING AND CONCLUSION OF LAW:

The Unemployment Insurance Rules pertaining to Section 35-4-5(b)(1) provide in pertinent part:

Unemployment insurance benefits must be denied if the employer had just cause for discharging the employee. In order to have just cause for discharge pursuant to Section 35-4-5(b)(1), there must be fault on the part of the employee involved. The basic factors, as established by the Rules pertaining to Section 35-4-5(b)(1), which are essential for a determination of ineligibility under the definition of just cause are:

B.1.a. Culpability. This is the seriousness of the misconduct 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,

b. Knowledge. The employee must have had a knowledge of the conduct which the employer expected.

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

It is unfortunate, for the claimant, that his court action came to the attention of the employer. Yet, his actions toward the fourteen year old and his subsequent citation for solicitation shrouded the employer's ability to trust him to behave in a socially acceptable manner. The employer's reason for discharge was that the company's trust level in the claimant had eroded. Moreover, the employer was concerned the claimant might behave in a similar fashion with its customers. The employer did not want to risk this possibility. The employer's position is understandable in light of the claimant's past actions and after his being warned that any similar behavior would result in dismissal. A service company, as is Les Olson, does have the right to expect its service people to behave in a dignified and professional manner. Since the claimant's behavior shrouded the employer's trust, the


company acted reasonably by separating him. It is held the claimant breached the standards of behavior the employer had a right to expect and that his conduct did rise to the level of knowledge, culpability and control to impose a disqualification. Benefits are denied

A contributing employer may be relieved of charges if an individual is separated for reasons held to be disqualifying. As the claimant was separated for disqualifying reasons, the employer is relieved of charges for this claim.

DECISION:

The decision of the Department Representative denying benefits pursuant to Section 35-4-5(b)(1) of the Utah Employment Security Act is affirmed effective October 2, 1988, and continuing until the claimant has returned to bona fide covered employment and earned wages for such services equal to at least six times his weekly benefit amount and is otherwise eligible.

Les Olson Company is relieved of charges for John P. Shupe pursuant to Section 35-4-7(c)(3)(F) of the Act.


LaVone Liddle-Gamonal
Administrative Law Judge
DEPARTMENT OF EMPLOYMENT SECURITY

This decision will become final unless, within ten days from November 29, 1988, further written appeal is made to the Board of Review (P.O. Box 11600, Salt Lake City, Utah 84147) setting forth the grounds upon which the appeal is made.

mj

Attachment

cc: Les Olson Company
ATTN: Personnel Dept.
3244 South 300 West
Salt Lake City, Utah 84115

Ward Harper, Esq.
Utah Legal Services
124 South 400 East
Salt Lake City, Utah 84101

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

TRC/LLG/WMF/mgn

JOHN P. SHUPE

S.S.A. No. 228 73 6159

:

:

Case No. 88-A-4980

:

DECISION

:

Case No. 88-BR-458

DEPARTMENT OF EMPLOYMENT SECURITY

:

The claimant, John P. Shupe, appeals the decision of the Administrative Law Judge affirming an earlier Department determination which held that the claimant was discharged from his employment for disqualifying conduct pursuant to §35-4-5(b)(1) of the Utah Employment Security Act. The ALJ's decision therefore denied payment of benefits to the claimant effective October 2, 1988 and continuing until he has worked in bona fide covered employment and earned wages equal to at least six times his weekly benefit amount and is otherwise eligible. The ALJ's decision also relieved the employer, Les Olson Company, of liability for benefit charges pursuant to §35-4-7(c) of the Act.

After careful consideration of the record in this matter, the Board of Review finds the decision of the Administrative Law Judge to be a correct application of the provisions of the Utah Employment Security Act, supported by competent evidence, and therefore affirms the decision. In so holding, the Board of Review adopts the findings of fact and conclusions of law of the Administrative Law Judge.

In affirming the decision of the Administrative Law Judge, the Board of Review notes that the claimant's actions toward the fourteen year old boy on the employer's premises, his subsequent citation for solicitation, and his failure to report to the employer that the reason he had to go to court was not to act as a witness but to appear as a defendant on a criminal charge of solicitation, very substantially adversely affected the employer's ability to trust the claimant. It affected the employer's ability to trust the claimant in general and also to trust the claimant to behave in the future in a manner such as not to harm the reputation of the employer; or to harm the relationship of the employer with its customers; or to possibly render the employer liable in damages for the claimant's misconduct directed toward customers or other employees of the employer or other third parties dealing with the employer and coming in contact with the claimant.

JOHN P. SHUPE
S.S.A. No. 228 78 6159

- 2 -

Case No. 88-A-4980
Case No. 88-BR-458

This decision becomes final on the date it is mailed, and any further appeal must be made within 30 days from the date of mailing. Your appeal must be submitted in writing to the Utah Court of Appeals, Midtown Plaza, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §63-46b-15 of the Utah Administrative Procedures Act and Rule 14 of the Rules of the Utah Court of Appeals, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Rules of the Utah Court of Appeals.

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 17th day of February, 1989 by mailing the same, postage prepaid, United States mail to:

Mr. Ward Harper
UTAH LEGAL SERVICES, INC.
Attorneys at Law
For: John P. Shupe
124 South 400 East, 4th Floor
Salt Lake City, UT 84111

Mr. John P. Shupe
8592 Wasatch Boulevard
Salt Lake City, UT 84121

Mr. R. Scott Olson, President
Les Olson Company
3244 South 300 West
Salt Lake City, UT 84115

Moselle Neumann

BOARD OF REVIEW
Thomas L. Callan

Dated this 7th day of February, 1989.

Date Mailed: February 17, 1989.

D. H. White
W. L. Smith

000055

615-C
8/81

get it



Employment Statement
+ Rebuttal

UTAH DEPARTMENT OF EMPLOYMENT SECURITY APPENDIX E (Page 1)

STATEMENT REGARDING CLAIMS FOR BENEFITS

EXHIBIT 6B

Claimant's
Name

John P. Shupe

Social

Security No. 328-78-6159

Reference (Enter type and date of claim)

Apparently, the counseling hadn't worked because John told us he was being arrested for solicitation of sex. Earlier he had requested time off saying he had to appear in court as a witness. He later told me when he got there the court was closed. He previously had lied to me about being a witness. He was there in court to defend himself on the prostitution charge. We had told John that if he was involved in any other situation of inappropriate behavior - such as the occurrence at work, and if in anyway involved work, he would be terminated. John goes out to service copiers and is around our customers. We worried about him making inappropriate comments while with our customers - so it was a serious matter of concern. However, we did want to be fair with John.

The day he was arrested, he called in saying he'd over- slept - he was one hour late. John was told at term that it was an accumulation of reasons - the arrest being the last straw. Work was a major factor - he had been verbally warned late August about his habitual tardiness (I don't recall whether

FOR PRIVACY ACT NOTICE SEE UNEMPLOYMENT INSURANCE CLAIMANT GUIDE

I know that the law provides penalties for falsifying statements in order to obtain benefits. I certify that the above statements are true and correct to the best of my knowledge and belief. I also considered his demeanor at work and his court appearance - We trust him with \$900/wk. took + his behavior - I lost my trust - that influenced my decision.

Representative:

Date Signed:

1. 1. 81 Hon. Allen (tele



UTAH DEPARTMENT OF EMPLOYMENT SECURITY
APPEAL FROM DECISION OF REPRESENTATIVE

10: 11/1/88
APPENDIX E (Page 2)

JOHN P. SHUPE
CLAIMANT'S NAME

8592 WASATCH BLVD.
CLAIMANT'S ADDRESS

SALT LAKE, UTAH 84121
STREET OR P.O. BOX

CITY STATE ZIP

228 78 6159
SOCIAL SECURITY NUMBER

942-1036
TELEPHONE NUMBER

☐ Check here if new address
676 done on CIC on 11/2/88 by R1

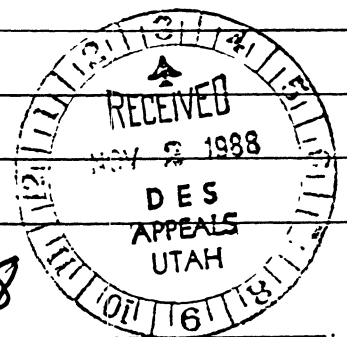
APPEAL FILED BY:

☒ Claimant ☐ Employer ☐ Other (specify)

ISAGREE with the decision of a Department Representative dated 10-28-88 which denied (circle one) benefits effective date 10-02-88 under Section 35-4-5(B)(1) of the Utah Employment Security Act. The grounds for this appeal are:

I am appealing a decision of denial of benefits under Sec 5(B) - I know I was half truthful in a matter involving a Court appearance and that the Employer got to know the situation at a later time - I consider that I should not have been terminated on account of that situation only.

I believe I had really improved tardies and attendance which had been a problem before. I request a revision.



I am requesting the following relief through this appeal:

- ☒ Allowance of unemployment benefits effective (date)
- ☐ Denial of unemployment benefits effective (date)
- ☐ Relief of benefit cost charges.
- ☐ Other (explain)

EXHIBIT 8

LO Comment: Claimant did not submit new information that would warrant a change at this level. Should be handled by Appeals RN 110288.

Place your initials at the end of your statement. Use the reverse side if you need more space. This appeal can only be signed by the person claiming benefits, the employer, or another interested party.

UNDERSTAND that copies of this appeal will be sent to other interested parties and that an appeal hearing will be scheduled if the decision is not changed by the Department review authority.

Claimant's Signature John P. Shupe Delivery Date to Department Nov. 2nd - 88. **000011**

OLSON Uh, should be me. I was John's supervisor.

DGE Allright, and we'll go ahead and you're Scott Olson, is...?

OLSON I'm Jim, James Olson.

DGE James Olson?

OLSON Um-hmm.

DGE Allright, then, go ahead, Mr. Harper.

HPER Um, your honor, I don't mean to waste the court's time because I realize you are pressed for time, but I think an opening statement in this case would, would help. John Shupe's job was to repair copy machines. He would travel around to different businesses and work on their copy machines. He was, um, he was discharged after being arrested on company property when he came to work and I think it's very understandable why, um, why Mr. Olson, um, was upset at that happening. It certainly caused a disruption, um, but I don't think that that, while that may have given him good reasons for discharging John, I don't think that it constitutes just cause for denying him unemployment benefits. The crime that he was charged with was solicitation, um, and the reason that he was arrested was his court date, he was, he had, he had a scheduled court date, he went in and the court was closed, they were having some seminar. So, um, so he left. The court later sent him a letter saying that he should reschedule his, his hearing to enter his plea. But they sent him a letter on the same day that they came to arrest him so he never got it. So when he showed up for work, the police were there and arrested him for failure to appear on this other charge. He, he eventually pled guilty to a third degree misdemeanor and got a hundred dollar fine but at that time, he hadn't been, he hadn't been tried. The, the crime didn't occur on company property and it wasn't connected with his employment. It wasn't on the property, it wasn't at a business he was at, it was, uh, on State Street during his lunch hour, okay. Unfortunately, all these things, I, one can understand why they're very upsetting to an employer, especially perhaps in the state of Utah, um, but also unfortunately that these events cost Mr. Shupe his job and, um, these, this arrest was, uh, was caused by police bureaucracy fouling up, which was not within his control. The arrest and the events surrounding the arrest also don't constitute culpable acts. Certainly there was harm caused by police coming to the Olson's property and arresting him. There was probably a lot of speculation and gossip among the employees. But I, I think there's little reason to believe that his potential customers would find out. There were two other events that I believe led to Mr. Olson's decision to terminate John. A year ago, October 1987, a complaint was filed by the father of a 14-year old boy who sold, I believe, donuts or something that came around to the parking lot outside, outside the business and, um, the complaint was for some vulgar language John was using to him and I think it was very commendable of Mr. Olson not to terminate John at that time, but he allowed him to continue working there under two conditions; one that he seek counselling and two, that that sort of thing not happen again, okay. And John was in counselling for that entire year. He never let anything like that happen again. He lived up to those conditions. Now there is one other thing that I think led to the, to

Mr. Olson's decision to terminate him, was that when he was suppo-, initially supposed to appear in court, John lied to them. He told them that he was supposed to be there as a witness. And this doesn't really justify that lie but John felt that this thing wasn't connected to his work and also, just the sort of social disapproval surrounding that sort of thing, especially a com-, what had happened the year before, he had the feeling that he, he would be fired if he told them so he told them he was going to be there as a witness. After the police arrested him and Mr. Olson asked, asked him what had happened, after he figured out that this, he wasn't really supposed to be there as a witness, John told him the truth and he was fired. Um, now, unfortunately, the, I think these sorts of events reflect something sort of odd about our own society and that is the sort of over-emphasis on, on sex, even victimless crimes are often punished, um, and I think that really, the, the part of the, the part of the unemployment rules that was designed to deal with that, with that sort of thing, where there's huge social disapproval and it's such that we make something a crime, is really 5(b)(2) and I think that that section requires not only that the crime be connected, um, be committed in connection with work but also that it include a criminal act involving dishonesty and I don't think either of those things can be shown in this case.

JUDGE Thank you. And which one of you gentlemen wishes to testify first?

J.OLSON I will.

JUDGE Would you raise your right hand to be sworn?

ADMINISTRATION OF THE OATH. WITNESS ANSWERED AFFIRMATIVELY.

JUDGE Thank you, sir, if you'd state your name and position for the record?

J.OLSON Uh, James R. Olson, general service manager.

JUDGE And the name of the company?

J.OLSON Les Olson Company.

JUDGE And its address?

J.OLSON 3244 South 300 West, Salt Lake City, Utah.

JUDGE And the zip code?

J.OLSON 84115.

JUDGE Allright. Were you the direct supervisor of Mr. Shupe?

J.OLSON Uh, yes, I was his, uh, he actually was supervised by Duane Anderson, whom I supervise as my Sharp service manager.

JUDGE So you were the second level?

OLSON Yes.

DGE Allright. Are you testifying from, in terms of the separation, from first-hand knowledge or from what others have told you?

OLSON First-hand knowledge.

DGE Allright. We show that Mr. Shupe was employed with the company from October 7, 1985 to September 26th of '88, are we correct?

OLSON Yes.

DGE And his job title when he left?

OLSON Ser-, uh, service technician.

DGE And his rate of pay?

OLSON Uh, \$800 a month base salary plus commissions.

OLSON \$850 a month.

OLSON \$850, yeah, I'm sorry.

DGE And was this a full or part time position?

OLSON Full.

DGE What caused this job to end, was this a quit or a discharge?

OLSON Well, it was, uh, he was terminated.

DGE What were the circumstances?

OLSON Basically, uh, according to the opening statement. I received a call, well, to start it out, I arrived to work the day that John was terminated and there was a police officer waiting in the parking lot and, being curious, I went over and asked him if I could help him and he said no, he was waiting here for John Shupe. That's none of my business so I went in the, my office and began work and of course like, uh, has already been stated, there was a lot of talk of what's he here for? What's going on? And I just, you know, tried to direct the day's work like normal. Uh, shortly after 8:00, I got a call or it might have almost been 9:00, I believe, I'm not exactly sure of the exact time but I received a call from John saying that he had overslept. He'd been previously warned, uh, or cautioned, you know, you need to be on time. We'd talked several months earlier about that. He'd had a problem with that and it repeated that morning. At that time I didn't say anything about the police waiting in the parking lot or anything like that and the next thing I knew I got a call from John approximately 11:00, I think, can't remember the exact time again but, uh, stating that he'd been arrested and stating the, what was going on. From, uh, that point, he, little vague on what time he got back to the office but at that point, he was let go.

He asked at that point, "Why am I being fired for what happened today?" And at that point, I had told him no, it's an accumulation of things, uh, the main reason being that, uh, he wasn't honest with me about what had happened. All of our employees in John's position carry a large amount, not a large amount, but a, probably a couple thousand dollars worth of supplies, parts, tools with them and where he was dealing with our customers, you know, out in the field, on his own, and, uh, with all of the stuff we were putting in his care, I just felt like if he'd lied to me about this kind of thing, what else might he lie to me about, you know.

JUDGE What did he lie to you about?

J.OLSON Well, he stated, uh, originally, when he came to me, he mentioned, like has already been stated, that, uh, he had to appear in court as a witness and I says, "Oh, do you want to tell me about it?" And he said no. Of course, I didn't pry or ask any more about it and...

JUDGE When was this stated to you?

J.OLSON Uh, this would've been, oh, several days before he had, uh, asked for the time off, which has already been stated, I think, today. I can't remember the date that, uh...

JUDGE Was this a few days before separation or...?

J.OLSON No, this would've been several weeks, I believe. Possibly longer, a little bit longer than that, but he'd asked, said, "I need this time off to go appear as a witness," and of course, we let him go. Uh, he actually, I guess, went to be the witness, the court was closed, he still ended up taking a substantial amount of time off, uh, possibly several hours, from what I was told by his supervisor, uh, Duane Anderson. And come to find out he never did go to the, uh, to the court. So at that point, uh, you know, I wasn't aware that he never went to the court, but then, uh, the policeman came and all of what's already been mentioned transpired where he was arrested, taken to jail, came back and we talked about it and I found out he'd lied to me, you know,...

JUDGE Lied to you about the previous court date?

J.OLSON Yes, saying that, uh, he'd had to appear as a witness when in all actuality it was a charge against himself. And I just felt like we could no longer trust John with the responsibilities and the products we were putting under his care.

JUDGE Anything else you wish to add or state?

J.OLSON No.

CLAIMANT Could I make a...

JUDGE Not right now. This gentleman is testifying. Any questions you have of this person, Mr. Harper?

ARPER Did you, did you have complaints with customers about John's dishonesty?

.OLSON I hadn't in the past, no.

ARPER Did you make any calls to see if he had performed some dishonest acts with regard to them?

.OLSON No, I felt like what I'd received from him at work was sufficient for my needs.

ARPER Now, now after this incident of the previous year, I imagine that you were, um, you were watching him pretty closely, weren't you?

.OLSON No, no more than I would anybody else. I always try to be as fair as possible.

ARPER Okay, but you didn't, you didn't, you haven't noticed any other signs of dishonesty other than, than the, than lying about being a witness?

.OLSON I really felt okay with John.

ARPER I have nothing else.

JDGE Thank you. I thank you for your testimony, and do you need to give some additional testimony?

.OLSON I'd like that.

JDGE Would you raise your right hand?

ADMINISTRATION OF THE OATH. WITNESS ANSWERED AFFIRMATIVELY.

JDGE Thank you, sir. If you'd state your name and position with the company?

.OLSON Scott Olson, I'm personnel director, manager at Les Olson Company in Salt Lake City.

JDGE Allright.

.OLSON And I want to refer back to Mr. Harper's opening statement. It was, represented the facts fairly accurately. I'd like to discuss some of the things that happened a year ago when John was brought in for talking to the donut salesman and I'm not doing this to bring up any bad blood, John, but that, in my memory, has to be one of the most grueling interviews that we've ever had with an employee. There were several of us involved in that and we terminated John at that time. John literally pled to the company for his job and, uh, we, uh, somehow we, our hearts were touched by that and we said, John, we will keep you on the basis that Mr. Harper already described, that number one, he receive counselling for it, and I personally followed through with John to see that this happened and apparently it had; number two, he was placed on probation for 90 days that if any act of misconduct we indicated to him that he would be terminated; and thirdly, he was warned that if any act that even resembled this type of incident occurred again in the future, he would be terminated immediately. And the charge that was, uh, put against

John by this donut salesman's father is that he had propositioned him, quote unquote, for sex, a young man. And at that time, it was very difficult to, to get John to speak about it, to feel like he was telling us the truth, and it was only until his job was on the line that he finally discussed what actually he had said and even at that point, I'm not sure that we received the truth but our hearts were moved by the plea that John made for his job and, and therefore, we, uh, we did allow him to stay on under those conditions. When this second incident occurred, we, uh, we, as an employer, I just want to make a statement about our role as an employer in the thing, we didn't feel like we could afford the potential liability that we might have because if he was, if these types of acts were occurring again, we didn't know whether he might be in a customer's office at some point in time and, uh, do something inappropriate there. We just didn't feel like we could take that liability, so along with what Jim has indicated, uh, the liability that we felt as an employer to have an employee like that, uh, whether he-, whether the charge had been proved or not, the fact that a charge had been levelled and the second time, uh, we didn't feel like we could be liable for that so...

JUDGE Thank you. Mr. Harper, any questions you have?

HARPER I have no questions.

JUDGE Thank you. Then I'll take your testimony, sir. Would you raise your right hand to be sworn?

ADMINISTRATION OF THE OATH. CLAIMANT ANSWERED IN THE AFFIRMATIVE.

JUDGE Thank you, sir. If you'd state your name and current mailing address for the record?

CLAIMANT It's John Phillip Shupe. My address is 8592 Wasatch Blvd., Salt Lake City, Utah.

JUDGE And your zip code is 84121?

CLAIMANT Yes.

JUDGE Allright, and the last place that you worked prior to filing for benefits, was that Les Olson?

CLAIMANT Yes, ma'am.

JUDGE And you've heard the employer state your dates of employment, the type of work you were doing, hours and wage. Is that correct to the best of your knowledge?

CLAIMANT That's correct.

JUDGE And would you agree that this is a discharge rather than a quit?

CLAIMANT Yes.

JUDGE Thank you. Go ahead, Mr. Harper.

RPER John, would you describe the events that led to your arrest and what happened after that?

AIMANT Well, as I had indicated before, I, I was served a subpoena by the South Salt Lake Police Department to appear in court on the 14th of September for the charge of prostitution or solicitation of sex. Now I'd, as Jim said, I told him that I had to appear as a witness that day because I felt that I could take care of this matter without involving the company and without, other than taking a couple hours off to go to court, I felt like I had, that it would not involve the company's time beyond that. Um, I talked to a lawyer and I was told that, with my previous clean record, the worst that would happen would be I would get a fine so I felt that because I was not going to have to go to jail, that I would not be taking away anything from my employer as far as my commitment to, you know, 40-hour week. Now, when I went to court that day, I told my boss, Jim Olson, that I had to appear as a witness. Obviously, that's not true, but I said that because I didn't really want to tell him what was really going on because I felt that I could take care of it and it would be out of the way and no one really had to know about it. Um, in hindsight, I almost, you know, could've just as easily said I had a doctor's appointment or something rather than have to explain why I have to go to court but I really didn't want to lie to them, you know, I, I felt that, you know, having to go to court was a bad enough deal and for me to have to lie and say that I was doing something else would just be making it worse. So I told Jim that I had to go to court but I said it was as a witness. And when I went to court that morning, uh, there was a sign on the door which said that the courtroom was going to be closed all day. I went upstairs to the administrative offices and I asked the secretaries there what was going on. I explained that I had been served a subpoena telling me to appear in court on that day and they said that the court was closed all day because of a seminar and that I, in fact, should've never been scheduled for that date. Now, I was, I told them well, what am I supposed to do, or I asked them, what am I supposed to do and she said well, that I should call the next day and ask the court, you know, when I would be appointed another date. Well, I did not do that. That was probably my, my single greatest mistake in this whole affair because if I had called and if I had set up another date, I could've probably taken care of this whole incident without involving either my company or the police but I guess in a very foolish way, I was hoping that perhaps since they'd made the mistake of scheduling me for that day to begin with that perhaps they would forget about the whole thing, you know. In hindsight, that was very poor judgement on my part because if I had in fact called and made another appointment, they probably, everything that's happened here could've been avoided. But I thought perhaps nothing would become of it and it wasn't until the 26th of September, Monday morning, when I was arrested on company property, that I received any sort of notification from the justice system from the courts or the police. Um, I received a letter, which I have with me if the court would like to see it, dated that same morning, which I received two days later on the 28th of September telling me that because I had failed to appear in court that I was subject to arrest. Now obviously I had no chance to act on that request because in fact I was arrested that same day and I explained to the arresting officer that I had appeared in court and the court had been closed. He checked the records right then and verified that in fact the court had been closed that day and that I was telling the truth in that regard. But he said that I should've followed up on it so therefore, in his way of looking at it, it was half the court's fault and half my fault. And

expecting grave consequences for what had transpired. In my, my reason for making this claim, or, or for appealing the original decision is not so much that I have any quarrel or disagreement with my employer. Under the circumstances, I do believe that they had a good reason to let me go. However, I feel that the court system, uh, the court is responsible for what, for my losing my job more than anyone. Now I realize I can't really, it's hard to, to try to blame the courts, but in fact, because of the way they handled my quote failure to appeal, or failure to appear in court, that this whole matter resulted

JUDGE Anything further, Mr. Harper?

HARPER Um, where, where did, um, the initial crime take place?

CLAIMANT It was on State Street.

HARPER And, and what time was this?

CLAIMANT It was about noon.

HARPER Okay, um, what were you doing at the time?

CLAIMANT I was on my lunch hour.

HARPER I, I have nothing else, your honor.

JUDGE Allright, am I correct then you were working that particular day but you were off work for lunch at that time?

CLAIMANT Yes, I have an hour for lunch.

JUDGE Allright. Apparently, you sought some counselling, is that correct?

CLAIMANT Yes, I have been seeing a counsellor on a regular basis.

JUDGE Okay, and you're continuing with that?

CLAIMANT Uh, actually I stopped that after my termination, uh, partly because the, the way it was set up, uh, Les Olson medical insurance company paid for half of the charge um, from the, the counselling, and I paid the other half and, but after losing my job, I no longer have any medical benefits so therefore the insurance company would not, at least, I, I thought the insurance company would not continue to pay the other half so I have not seen the counsellor since then.

JUDGE Okay, that's enough. Mr. Harper, are there any medical grounds to establish, uh, lack of control, so perhaps the employer could be relieved of charges, to your knowledge?

HARPER Um, not that I'm aware of. Let me,...

JUDGE Do you want to confer with your client?

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

TRC/LLG/WMF/mgn

JOHN P. SHUPE

S.S.A. No. 228 73 6159

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Case No. 88-A-4980

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DECISION

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Case No. 88-BR-458

DEPARTMENT OF EMPLOYMENT SECURITY

:

The claimant, John P. Shupe, appeals the decision of the Administrative Law Judge affirming an earlier Department determination which held that the claimant was discharged from his employment for disqualifying conduct pursuant to §35-4-5(b)(1) of the Utah Employment Security Act. The ALJ's decision therefore denied payment of benefits to the claimant effective October 2, 1988 and continuing until he has worked in bona fide covered employment and earned wages equal to at least six times his weekly benefit amount and is otherwise eligible. The ALJ's decision also relieved the employer, Les Olson Company, of liability for benefit charges pursuant to §35-4-7(c) of the Act.

After careful consideration of the record in this matter, the Board of Review finds the decision of the Administrative Law Judge to be a correct application of the provisions of the Utah Employment Security Act, supported by competent evidence, and therefore affirms the decision. In so holding, the Board of Review adopts the findings of fact and conclusions of law of the Administrative Law Judge.

In affirming the decision of the Administrative Law Judge, the Board of Review notes that the claimant's actions toward the fourteen year old boy on the employer's premises, his subsequent citation for solicitation, and his failure to report to the employer that the reason he had to go to court was not to act as a witness but to appear as a defendant on a criminal charge of solicitation, very substantially adversely affected the employer's ability to trust the claimant. It affected the employer's ability to trust the claimant in general and also to trust the claimant to behave in the future in a manner such as not to harm the reputation of the employer; or to harm the relationship of the employer with its customers; or to possibly render the employer liable in damages for the claimant's misconduct directed toward customers or other employees of the employer or other third parties dealing with the employer and coming in contact with the claimant.