

1989

# John P. Shupe v. Board of Review of the Industrial Commission of Utah, Department of Employment Security : Brief of Appellant

Utah Court of Appeals

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Winston M. Faux; Attorney for Respondent.

Ward Harper; Utah Legal Services Inc.; Attorneys for Petitioner.

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## Recommended Citation

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. SHUPE,

890158-CA

Claimant-Petitioner

vs.

BOARD OF REVIEW OF THE  
INDUSTRIAL COMMISSION OF UTAH,  
DEPARTMENT OF EMPLOYMENT  
SECURITY,

Respondent.

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Case No. 890158-CA

Category No. 6

BRIEF OF APPELLANT

Appeal from a decision of the Board of Review, Industrial  
Commission of Utah on February 7, 1989.

Ward Harper  
UTAH LEGAL SERVICES, INC.  
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ATTORNEY FOR RESPONDENT

FILED

JUN 13 1989

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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JOHN P. SHUPE,

Claimant-Petitioner

vs.

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**PARTIES TO THE PROCEEDINGS**

John P. Shupe, claimant for unemployment benefits.

The Board of Review of the Industrial Commission of Utah,  
Department of Employment Security.

The Les Olson Company.

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Case No. 890158-CA

Category No. 6

**JURISDICTION AND NATURE OF PROCEEDING**

This Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. §78-2a-3(2)(a)(1987). This is an appeal from a final order of the Utah Industrial Commission, after a formal adjudicative proceeding.

**STATEMENT OF THE ISSUES PRESENTED ON APPEAL**

Did the Industrial Commission apply the correct standard in its denial of unemployment insurance compensation benefits to John Shupe? Under the appropriate standard did the actions of John Shupe constitute disqualifying conduct for purposes of unemployment compensation benefits?

**DETERMINATIVE STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS**

Utah Code Ann. §§35-4-5(b)(1) and 5(b)(2); Utah  
Administrative Code §§R475-5b-1 and R475-5b-2.

**STATEMENT OF CASE**

Claimant John Shupe began work as a full-time copy machine repairman for the Les Olson Company on October 7, 1985. On



September 14, 1988, Mr. Shupe was arrested for solicitation. The solicitation occurred during his lunch hour, when he was off company property and not on the properties of any businesses which he serviced as a repairman. He eventually pled guilty to a third-degree misdemeanor, and was fined \$100.00.

When he received his notice to appear to enter his plea, he got permission to take time off work and to go to court on the appropriate day. When asked about why he needed to go to court, the claimant, fearing reprisal, did not tell his employer the real reason for his court appearance and instead said that he had to appear in court as a witness. When he got to the court, he was informed that the date scheduled for his plea was incorrect, that the court was not in session that day, and that he would have to reschedule his court date.

As of September 26, 1988, Claimant had not rescheduled his court date. Nor had he received the usual court warning in the mail that failure to reschedule would result in his arrest. On that day, a warrant was issued for his arrest and he was arrested on company property when he arrived for work.

After his release later that day, Claimant called work and told his employer why he was arrested. He was immediately discharged. Two days later, he received in the mail his initial warning from the court to reschedule his appearance or be subject to arrest.

The Utah Department of Employment Security denied Claimant unemployment compensation benefits on October 28, 1988. The

denial was affirmed by an Administrative Law Judge (ALJ) on November 29, 1988, after a hearing on November 21, 1988. The ALJ found relevant an incident over thirteen months earlier, in October 1987, when Claimant had purportedly made sexually-oriented comments to a fourteen year-old boy on company property, and had been put on probation following the incident. The ALJ held that there was just cause for discharge because the actions of Claimant "shrouded the employer's ability to trust him (Claimant) to behave in a socially-acceptable manner." On February 7, 1989 the Board of Review of the Industrial Commission affirmed on the same grounds.

#### **STANDARD OF REVIEW**

In reviewing the application of statutes or regulations to the pertinent facts, this Court should apply an intermediate standard of review, which is a determination of whether the conclusions are reasonable and rational. Stegen v. Department of Employment Security, 78 Utah Adv. Rep. 46 (Utah Ct. of Appeals 1988). In determining which legal standard should be applied, the conclusions of the Administrative Law Judge and the Board of Review are entitled no deference.

#### **SUMMARY OF ARGUMENT**

The Administrative Law Judge and the Board of Review of the Industrial Commission used the incorrect legal standard in determining whether appellant John Shupe's actions constituted

disqualifying conduct for purposes of unemployment compensation benefits. However, even under the standard they used, that of just cause discharge, their conclusion that the conduct was disqualifying is not a reasonable and rational conclusion based on the pertinent facts because the appellant's actions were insufficiently "connected" to his employment and insufficiently indicative of fault on his part.

#### **ARGUMENT**

#### **POINT I. THE ADMINISTRATIVE LAW JUDGE SHOULD HAVE APPLIED UTAH CODE ANN. §35-4-5(b)(2) INSTEAD OF UTAH CODE ANN. §35-4-5(b)(1). UNDER THE FORMER CLAIMANT IS ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.**

Prior to 1983, Utah Code Ann. 35-4-5(b)(1) denied unemployment benefits to a claimant who was "discharged 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..." The Utah Supreme Court in Clearfield City v. Department of Employment Security, 663 P.2d 440 (Utah 1983) articulated a three-pronged test for determining "misconduct" and ineligibility for unemployment compensation. A claimant was held to be disqualified for purposes of unemployment compensation benefits (1) when he was discharged for an act or omission in connection with the employment (2) which was "deliberate, willful, or wanton," and was (3) "adverse to the employer's rightful interests." In that case the court also held that disqualifying actions need not be motivated by an intention to cause harm to the employer or an intentional disregard of his

interests, but could be "volitional acts by an employee who could not have been heedless of their consequences." Id. at 444.

Also in 1983, after the court had heard arguments, but before it had issued a decision, the Utah Legislature added a "just cause" provision to Section 35-4-5(b)(1), thereby denying eligibility for unemployment compensation benefits to any person:

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 claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment. (Emphasis added)

The case of Kehl v. Board of Review of Industrial Commission, 700 P.2d 1129 (1985) was the first to address the new "just cause" provision. The Kehl court determined that in order to find just cause, there still must be a finding of fault on the part of the claimant. The basic factors the court relied upon to establish "fault" and ineligibility for benefits under the definition of just cause were: (a) culpability, (b) knowledge, and (c) control.

In Lane v. Board of Review of Industrial Commission, 727 P.2d 206 (Utah 1986) the Utah Supreme Court held that the standards for "just cause" and "deliberate, willful or wanton misconduct" were identical since the court in Clearfield had already determined that the latter did not require intentional

harm to the employer's interests. Id. at 210. They interpreted the addition of "just cause" as designed to do exactly what the decision in Clearfield did: eliminate the requirement of intentional harm. See also Utah Administrative Code §R475-5b-1 II. 3. Since some fault on the part of the claimant was still required, the Industrial Commission had promulgated rules pertaining to culpability, knowledge, and control.

The plain meaning of Utah Code Ann. §35-4-5(b)(1) requires that for acts constituting crimes, it is not the proper to apply this particular section to determine disqualifying conduct. The statute explicitly limits its application to "an act or omission...not constituting a crime." Utah Code Ann. §35-4-5(b)(2) deals with discharges for criminal acts. It might be argued that "just cause" is a separate standard and that the limitation to non-criminal acts applies only to deliberate, wanton or willful misconduct. Not only does Lane rule out this interpretation, the court's decision there implied that the legislature was not attempting to modify the portion of 35-4-5(b)(1) limiting that section to crimes. Even the dissent in Lane, which claimed that there were two separate standards, was based on the reasoning that while "deliberate, wanton or willful misconduct" describes "conduct which falls short of being intentional but which is more culpable than negligence... 'just cause' for termination... might arise from the commission of a negligent act." Id. at 212. Finally, Utah Administrative Code §R475-5b-2 V. 1. and 2. state that discharge for crime should be

determined under 5(b)(1) only where it is disputed whether a crime was committed.

Utah Code Ann. §35-4-5(b)(2) requires not only a connection to work, but that the crime be one of dishonesty. It will be argued later that the actions of the claimant were not sufficiently connected to work to constitute disqualifying conduct, but it is clear that the claimant's crime was not one of dishonesty. John Shupe pled guilty to a third-degree misdemeanor for solicitation, and paid a \$100.00 fine. Utah Code Ann. §76-10-1302 defines solicitation as agreeing to engage in sex for a fee or loitering in front of a public building for that purpose. The Utah Unemployment Insurance Rules state that "dishonesty in this context generally means theft but may also include other criminal acts connected with the work that render an employee untrustworthy or show a lack of integrity." Utah Administrative Code §R475-5b-2 III. There is nothing in whatever act constituted the claimant's act of solicitation that indicates any lack of trustworthiness or lack of integrity. Since the Industrial Commission applied the wrong legal standard, and under the correct standard the claimant is entitled to benefits, the decision of the Industrial Commission should be reversed.

**POINT II. THE CLAIMANT'S CONDUCT WAS INSUFFICIENTLY  
CONNECTED TO EMPLOYMENT TO WARRANT DENIAL OF  
UNEMPLOYMENT INSURANCE BENEFITS.**

The Utah Unemployment Insurance Rules state that disqualifying conduct must "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." Utah Administrative Code, §475-5b-1 VIII. (emphasis added). Thus, in order for there to be a sufficient connection between the actions of the claimant and his employment (1) the concerns of the employer must be legitimate, (2) there must be a significant potential hinderance if the employee's ability to perform his duties, and (3) there must be significant potential harm to the employer's interests.

John Shupe was a copy-machine repairman. He was convicted of a misdemeanor and lied to his employer about why he had to go to court. Due mainly to bureaucratic error he was arrested on company property for not appearing in court to enter his plea.

What John Shupe was punished for in a court of law and by his employers through losing his job should not be the basis for denial of unemployment benefits unless his conduct was sufficiently connected to his employment. The incident involving the 14 year-old boy took place on company property and during work hours. It was sufficiently connected to his employment to be disqualifying conduct if other requirements were met. And the employer did take corrective action and set forth guidelines for the claimant to follow which he successfully completed. His ninety-day probation ended nine months prior to discharge.

Most of the conduct of the claimant that is relevant to this case took place away from the workplace and not during work hours. And while the claimant might have lied about why he had to appear in court because of embarrassment or fear of reprisal by

his employer, the magnitude of his lie (as compared with what potentially he had to lose by telling the truth) is minimal, and not necessarily reflective of his general trustworthiness as an employee. The claimant's reason for missing work was that he had to appear in court, and he informed his employer about this fact truthfully. Mr. Shupe's white lie about being a witness, rather than the defendant, was hardly advisable but does not warrant the generality that he is "untrustworthy" and therefore incapable of successfully completing his professional duties. But the supervisor who discharged the claimant, James Olson, testified that he fired him because of the lie about the court appearance, that the claimant could no longer be trusted with the tools the company left in his care (TR. 7).

This case is distinguishable from Clearfield City v. Dept. of Employment Security, 663 P.2d 440 (Utah 1983). The claimant's actions in that case were much more egregious; he committed an act of sodomy with one of his students at his secondary job at the Clearfield Job Corps Center, while being observed by other students. Id. at 441. It was widely publicized. And the claimant there was also a police officer. The incident significantly affected the his ability to perform his duties. As the court in Clearfield noted, since "the entire course of events was a matter of public notoriety in the city...(there) would surely have (been) a significant adverse effect upon the officer's credibility as a police officer and as a witness in the courts of law." Id. at 443. In the case at bar not only was there no



publicity which might have affected the claimant's ability to perform his duties, his duties were not of the sort which would likely be damaged by such publicity. As in Clearfield, the claimant also told a lie to his supervisor, but the extent of the lie was merely why he had to appear in court. Given the embarrassing nature of the situation, and its irrelevance to his work, this lie is hardly the sort of event that would be expected to be repeated.

The court in Clearfield also noted that the claimant there was breaking a law that he had an affirmative public duty to uphold. Mr. Shupe's profession added no such additional duties to be of extremely high moral character. The Administrative Law Judge held that employers are warranted in expecting that employees behave away from work "in a socially acceptable manner" (ALJ's decision, p. 2). This is too broad; it makes almost any conduct connected to employment. The employer does have an interest in preventing dishonor to the company's name and preserving the company's reputation is a legitimate concern. In the case at bar the claimant was not on company property, not at any business serviced by the company, not arrested while working, not arrested for a significant crime, and received no publicity, nor was he likely to receive publicity for the arrest. The proposition that there was significant potential harm to the employer's interests or that the claimant's ability to perform his job was affected in any way are not supported by substantial evidence.

The ALJ also suggested that the claimant broke a reasonable rule of the employer, "that any similar behavior (to the incident in October 1987) would result in dismissal" (ALJ's decision, page 2). But the first incident occurred on company property and during work hours. The employer presented little evidence regarding either incident, but there are obvious dissimilarities. The only similarity is that the both involved sex, and this connection itself depends on Scott Olson's hearsay within hearsay testimony regarding the first incident (TR. 9). There is not even the suggestion that the second event was "socially unacceptable" in a similar way. There was no suggestion that the behavior involved homosexual conduct or a minor. Its unacceptability consisted mostly in its illegality, which may just have been a matter of loitering in the wrong place at the wrong time. See Utah Code Ann. §76-10-1302 (1973). The employer's warning to the claimant in October 1987 was too ambiguous to constitute a rule and a reasonable interpretation of it would hardly apply to the actions for which the claimant was arrested for in connection to the solicitation charge. It is not a legitimate concern of the employer that employees behave in a "socially acceptable" manner when off company property and during non-working hours. The Utah Administrative Code reflect this; they require at least potential significant damage to the reputation of the business. Id. at §R475-5b-1 VII. Since this is not a legitimate concern, and what concerns the employer had were insignificantly related to either the claimant's ability to perform his duties or other potential

harm to the employer's interests, the decision of the Industrial Commission that the claimant's conduct was sufficiently connected to his employment to warrant denial of benefits should be reversed.

**POINT III. THE CLAIMANT'S CONDUCT DID NOT CONSTITUTE JUST CAUSE FOR DISCHARGE SINCE IT WAS NOT SUFFICIENTLY CULPABLE NOR COULD HE HAVE REASONABLY ANTICIPATED THE EFFECT IT WOULD HAVE.**

The Utah Unemployment Insurance Rules list three requirements for a determination of eligibility under its definition of just cause: (a) culpability (b) knowledge, and (c) control. Since the question of control is not at issue in the Shupe case, only the culpability and knowledge factors will be analyzed in this memorandum. These are the three factors that the court in Kehl v. Board of Review of Industrial Commission, supra, stated were the proper elements to consider in determining fault on the part of the claimant.

**A. THE CLAIMANT'S CONDUCT WAS NOT SUFFICIENTLY CULPABLE.**

The Kehl court defined culpability as the seriousness of the conduct as it affects continuance of the employment relationship. The discharge "must have been necessary to avoid actual or potential harm to the employer's rightful interests... 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." Utah Administrative Code §R475-5b-1 II. 1. a.

The court in Kehl held that the wrongness of claimant's conduct (carrying ten thousand pounds of explosives over a train track while a train was approaching), if viewed in the context of the employment and the potentially devastating effects on the employer's rights, was severe. Discharge in Kehl was necessary to avoid the potential harm to the employer's interests that another violation would cause.

Applying the "culpability" standard to the Shupe case, it should be reasonably concluded that Shupe's conduct doesn't reach the standard of culpability set forth in Kehl. Shupe's conduct was not a work-related or during-work act. Whereas Kehl's act of carrying explosives over the train tracks in the wake of an approaching train shows a reckless disregard for the company rules and an imminent danger to human lives, the claimant's conduct only concerned himself. 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. His conduct does not show a disregard for the company rules, nor does his conduct relate to his work at all. Company rules cannot reasonably regulate an employee's life during non-work hours, unless the regulation is regarding conduct which would prevent the employee from performing his/her job satisfactorily or could cause significant damage for the employee. Whether Shupe solicited sex

or not during his non-work hours has no bearing on whether he can perform his duties as a copy repairman to the satisfaction of his employer. And it is hard to see how his actions could subject the employer to any sort of legal liability.

Finally, there is no evidence that Shupe's conduct caused any negative publicity for the employer -- in fact, there is no evidence that the incident was publicized at all. Shupe's conduct can be distinguished from the conduct in the Kehl case, where a potential accident would definitely have received adverse publicity for Hercules, and might have caused a public outcry against the company for its lack of compliance with public safety concerns.

Shupe's conduct can also be distinguished from the conduct in Clearfield City v. Department of Employment Security, 663 P.2d 440 (Utah 1983), where a policeman who also worked part time as a counselor committed sodomy on the job site where he was a counselor. In the Clearfield case, the sodomy incident was widely publicized in the community. Said the Clearfield Court, "In the sensitive area of law enforcement a police officer's reputation of high moral character and his credibility as a witness in his frequent appearances in the court of law are essential to his effective performance of his duty...Under the circumstances, the claimant's actions were sufficiently culpable and adverse to the employer's rightful interest to invoke disqualification under Section 35-4-5(b)(1) of the Utah Employment Security Act." See Clearfield, 663 P.2d at 442.

Unlike the law enforcement area, Shupe's job as a copy-machine repairman did not require high moral character. Nor did Shupe's immoral conduct threaten to bring his company into disrepute. Without substantiated evidence of adverse publicity to the Les Olson Company proximately caused by Shupe's arrest, Shupe's conduct cannot be considered "culpable" and adverse to his employer's interests under 35-4-5(b)(1).

**B. IT IS NOT REASONABLE TO EXPECT THE CLAIMANT TO ANTICIPATE THE EFFECTS OF HIS CONDUCT.**

In Lane v. Board of Review of Industrial Commission, 727 P.2d 206 (Utah 1986), a truck stop employee was discharged from his employment when he was cited by policemen for selling beer to a minor. His employer company refused to pay him unemployment benefits. The court, in determining whether the employee had been discharged with just cause, looked at whether the employee "had knowledge" of the company policy not to sell beer to minors.

The court held that while the employee did have knowledge of the prohibition of liquor sales to minors, nonetheless his error in not checking the customer's identification was merely a mistake in judgment and not an intentional or knowing disregard of his employer's policy. Said the court, "there is nothing in the record to indicate that Telum (the employer) established any **clear procedures** for employees to follow to assure that beer would not be sold to minors, other than to instruct them to check identification when in doubt." Lane, 727 P.2d at 211.

Likewise, in the Kehl case, the Court held that in order for an employee to have sufficient knowledge of the conduct expected of him by his employer, the employer must have given either a clear explanation of the expected behavior or have a pertinent written policy regarding that conduct. "If the employer's expectations are unclear, ambiguous, or inconsistent, the existence of knowledge is not shown." Kehl, 700 P.2d at 1133.

In the case at bar, there was no clear written policy on employer's expectations of employees' behavior while not at work. Although Shupe was warned by his employer in 1987 that sexual solicitation of a minor on the job would not be acceptable to the company, there was no explanation given that any kind of solicitation whatsoever, whether on company property or not, whether during work hours or not, or whether to a minor or not, would be reprehensible to the company. With no company regulations and no verbal explanations of his expected conduct off-duty and during non-work hours, Shupe could not be expected to know that his non-work-related conduct was violative of company policy. He can only be held to have knowledge of what his employer's expectations of his conduct **on the job** were.

The Lane court held that the truck stop employee's omission of a check on a minor's identification was an isolated instance of poor judgment. Likewise, Shupe's off-site sexual solicitation is an isolated instance of poor judgment in a situation where he had no knowledge of company policy, indeed, a situation where company policy did not exist. Therefore, Shupe should not be

held to have the requisite knowledge which constitutes just cause.

**CONCLUSION**

Under Utah Code Ann. §35-4-5(b)(1), Claimant John Shupe was not discharged with just cause. His actions were not sufficiently connected with his employment to constitute just cause for discharge. His discharge was not necessary to avoid actual or potential harm to his employer's rightful interests, nor did he have the sufficient culpability or knowledge to constitute "fault," a necessary requisite to establishing just cause. The Industrial Commission should have applied Utah Code Ann. §35-4-5(b)(2), but the claimant's conduct did not constitute disqualifying conduct under this statute either. For these reasons we respectfully request that this court reverse the decisions of the Administrative Law Judge and the Board of Review of the Industrial Commission, and order the Industrial Commission to award unemployment compensation benefits to the claimant, John Shupe.

DATED this 1<sup>ST</sup> day of JUNE, 1989.

UTAH LEGAL SERVICES, INC.  
Attorneys for Claimant

  
By: WARD HARPER



CERTIFICATE OF MAILING

I do hereby certify that I mailed four true and correct copies of the foregoing Brief of Appellant to: Winston M. Faux, Attorney for Respondent, Board of Review of the Industrial Commission of Utah, Department of Employment Security, 1234 South Main Street, P.O. Box 11600, Salt Lake City, Utah 84147 on this 19<sup>th</sup> day of JUNE, 1989, postage prepaid.

Wm Hope

**35-4-5. Ineligibility for benefits.**

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

(a) For the week in which the claimant left work voluntarily without good cause, if so found by the commission, and for each week thereafter until the claimant has performed services in bona fide covered employment and earned wages for those services equal to at least six times the claimant's weekly benefit amount. A claimant shall not be denied eligibility for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

The commission shall, in cooperation with the employer, consider for the purposes of this chapter the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

Notwithstanding any other provision of this section, a claimant who has left work voluntarily to accompany, follow, or join his or her spouse to or in a new locality does so without good cause for purposes of this subsection.

(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.

(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.

## 5-5b. Discharge and Discharge for 1e

### 5b-1 Discharge

#### 5b-2 Discharge for Crime

##### 5b-1. Discharge

###### General Definition

Generally accepted concepts of justice are used in determining if a discharge is disqualifying under the "cause" provisions of the Act. Just cause is defined as a job separation that is necessary due to seriousness of actual or potential harm to the employer provided the claimant had knowledge of employer's expectations and had control over the instances which led to the discharge. Just cause is established if the reason for the discharge is just, 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 acting 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 employee's control. The question which must be established by the evidence is whether the claimant is at fault in his resulting unemployment. Unemployment benefits will be denied if the employer had just cause for discharging the employee. However, just 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 fault on the part of the employee involved.

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

1. Fault  
2. 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 employer's rightful interests. A discharge would be considered "necessary" if it is not consistent with reasonable employment practices. The wrongfulness 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, actual harm may not be shown and therefore it is not necessary to discharge the employee.

Longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgment. An employee who has historically complied with work rules does not demonstrate by a single violation, even though harmful, that such violations will be repeated and therefore require discharge to avoid future harm to the employer. For example, a long term employee does not have a history of tardiness or absenteeism if absent without leave for a number of days leading to a death in his immediate family. Although a violation of the employer's rules and may establish just cause for discharging a new employee, the fact that the employee has established over a long period of time that he complies with attendance rules suggests that the circumstance is more of an isolated incident rather than a violation of the rules that is or likely to be expected to be habitual. In this case because the potential for harm to the employer is not shown, it is not necessary for the employer to discharge the employee, and therefore just cause is not established.

### 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.

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.

### VII 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.

### R475-5b-2. Discharge for Crime

#### I General Definition

1 A crime is a punishable act in violation of law, an offense against the State or the United States. "Crime" and "Misdemeanor" are synonymous terms; though in common usage crime is used to denote offenses of a more serious nature. However, for example: an insignificant, although illegal act, or the taking of something which is of little or no value, or believed to have been abandoned may not be sufficient to establish that a crime was committed as defined for the application of this section of the Act, even if the claimant was found guilty of a violation of the law.

2. The duty of honesty is implied in any employment relationship. A worker is obligated to deal with his employer in truthfulness and good faith. A claimant discharged for dishonesty constituting a crime connected with his work is at fault in his resulting unemployment. The 52 week disqualification for "dishonesty constituting a crime" required by the statute is a mandatory penalty.

3 The basic factors which are essential for a disqualification under this provision of the law are that the individual was discharged for a crime that was:

- In connection with work
- Dishonesty
- Admitted or established by a conviction in court of law

### III Dishonesty

Dishonesty in this context generally means the claimant but may also include other criminal acts connected with the work that render the employee untrustworthy or show a lack of integrity. Dishonesty not involving a crime may still be disqualifying under provisions of Section 5(b)(1).

### IV Admission or Conviction in a Court

1 An admission is a voluntary acknowledgment

made by a claimant that he has committed acts which are in violation of the law. In this context, the admission may be a verbal or written statement by the claimant that he committed the act. The admission does not necessarily have to be made to a Department representative. However, there must be sufficient information to establish that it was not a false statement given under duress or made to obtain some concession.

2. A conviction is when a claimant has been found guilty by a court of committing acts which are in violation of the law. When the claimant pleads "no contest" or agrees to the diversionary program as provided by the court, this is treated, for the purposes of this section of the Act, the same as a conviction and benefits will be denied.

### V 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.

**76-10-1302. Prostitution.**

- (1) A person is guilty of prostitution when:
  - (a) He engages or offers or agrees to engage in any sexual activity with another person for a fee;  
or
  - (b) Is an inmate of a house of prostitution; or
  - (c) Loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.
- (2) Prostitution is a class B misdemeanor, provided that any person who is twice convicted under this section shall be guilty of a class A misdemeanor. 1973

**78-2a-3. Court of Appeals jurisdiction.**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

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

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;