

2009

Jennica E. Caldwell v. Workforce Appeals Board of the Utah Department of Workforce Services, and Macey's, Inc. : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jennica E. Caldwell; pro se.

Suzan Pixton; attorney for respondent.

Recommended Citation

Brief of Respondent, *Jennica E. Caldwell v. Workforce Appeals Board of the Utah Department of Workforce Services, and Macey's, Inc.*, No. 20090711 (Utah Court of Appeals, 2009).

https://digitalcommons.law.byu.edu/byu_ca3/1837

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JENNICA E. CALDWELL,

Petitioner,

Case No. 20090711-CA

v.

WORKFORCE APPEALS BOARD
OF THE UTAH DEPARTMENT OF
WORKFORCE SERVICES, and
MACEY'S, INC.,

Priority No. 7

Respondents.

BRIEF OF RESPONDENT

Petition for Review of a Decision of the
Workforce Appeals Board of the
Department of Workforce Services,
State of Utah

JENNICA E. CALDWELL
PETITIONER, PRO SE
6991 SOUTH HIGHWAY 165
HYRUM, UT 84319

SUZAN PIXTON - 2608
140 EAST 300 SOUTH
PO BOX 45244
SALT LAKE CITY, UT 84145-0244

Attorney for Respondent
Workforce Appeals Board of the
Utah Department of Workforce
Services

FILED
UTAH APPELLATE COURTS
APR 05 2010

IN THE UTAH COURT OF APPEALS

JENNICA E. CALDWELL,

Petitioner,

Case No. 20090711-CA

v.

WORKFORCE APPEALS BOARD
OF THE UTAH DEPARTMENT OF
WORKFORCE SERVICES, and
MACEY'S, INC.,

Priority No. 7

Respondents.

BRIEF OF RESPONDENT

Petition for Review of a Decision of the
Workforce Appeals Board of the
Department of Workforce Services,
State of Utah

JENNICA E. CALDWELL
PETITIONER, PRO SE
6991 SOUTH HIGHWAY 165
HYRUM, UT 84319

SUZAN PIXTON - 2608
140 EAST 300 SOUTH
PO BOX 45244
SALT LAKE CITY, UT 84145-0244

Attorney for Respondent
Workforce Appeals Board of the
Utah Department of Workforce
Services

TABLE OF CONTENTS

JURISDICTION OF THE COURT OF APPEALS	1
ISSUES PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	1
STATUTES AND REGULATORY PROVISIONS AT ISSUE	3
STATEMENT OF THE CASE	3
A. Nature of the Case, Course of Proceedings, and Disposition Below	3
B. Statement of the Facts	4
SUMMARY OF ARGUMENTS	5
POINT I	5
THE ALJ AND THE BOARD FOUND THE EMPLOYER'S WITNESSES MORE CREDIBLE THAN THE CLAIMANT. THAT CREDIBILITY DETERMINATION, BY THE TRIER OF FACT, SHOULD BE UPHELD.	
POINT II	11
THE RECORD SUPPORTS THE FINDINGS OF FACT THAT THE CLAIMANT DID NOT ESTABLISH GOOD CAUSE FOR VOLUNTARILY QUITTING HER EMPLOYMENT, AND A DENIAL OF BENEFITS IS NOT CONTRARY TO EQUITY AND GOOD CONSCIENCE.	
POINT III	16
THE CLAIMANT ATTEMPTS TO INTRODUCE EVIDENCE THAT WAS NOT PRESENTED DURING THE HEARING IN THIS MATTER.	

POINT IV	19
----------------	----

THE CLAIMANT HAS NOT MARSHALED THE EVIDENCE IN
SUPPORT OF THE FACTUAL FINDINGS OF THE WORKFORCE
APPEALS BOARD.

CONCLUSION	21
------------------	----

ADDENDUM A - Determinative Statutes and Rules

ADDENDUM B - Decision of the Department Representative

ADDENDUM C - Decision of the Administrative Law Judge

ADDENDUM D - Decision of the Workforce Appeals Board

ADDENDUM E - References to the Record

TABLE OF AUTHORITIES

CASES CITED

<i>Adams v. Board of Review</i> , 776 P.2d 639, 641 (Utah 1989)	1, 13
<i>Arrow Legal Solutions Group, P.C. v. Dep't of Workforce Servs.</i> , 2007 UT App 9	10
<i>Chapman v. Industrial Comm'n</i> , 700 P.2d 1099, 1101-02 (Utah 1985)	15
<i>Crockett v. Crockett</i> , 836 P.2d 818 (Utah App. 1992)	19
<i>Denby v. Board of Review</i> , 567 P.2d 626, 630 (Utah 1977)	1
<i>Grace Drilling Company v. Board of Review</i> , 776 P.2d 63, 67-68 (Utah Ct. App. 1989)	20, 21
<i>Heinecke v. Dept. of Commerce</i> , 810 P.2d 459, 464 (Utah App. 1991)	5
<i>Morton Int'l v. Auditing Div. Of Utah State Tax Comm'n.</i> , 814 P.2d 581, 588 (Utah 1991)	2

<i>Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.</i> , 872 P.2d 1051 (Utah App. 1994)	19, 20
<i>Robinson v. Department of Employment Sec.</i> , 827 P.2d 250, 252 (Utah Ct. App. 1992)	1, 2
<i>Salt Lake City Corp. v. Department of Emp. Sec.</i> , 657 P.2d 1312, 1317 (Utah, 1982)	7, 15
<i>Slane v. Department of Workforce Services, et. al.</i> , 2000 UT App 67, ¶3	13
<i>Swiecicki v. Department of Employment Sec.</i> , 667 P.2d 28, 30 (Utah 1983)	13
<i>West Valley City v. Majestic Inv. Co.</i> , 818 P.2d 1311, 1315 (Utah Ct. App. 1991)	20

STATUTES

§35A-4-405(1), Utah Code Annotated	1, 2, 3, 11, 21
§63G-4-403, Utah Code Annotated	1
§78A-4-103, Utah Code Annotated	1
R994-405-102, Utah Admin. Code	11
R994-405-103, Utah Admin. Code	13
R994-405-201, Utah Admin. Code	10
R994-405-208(4), Utah Admin. Code	10

JURISDICTION OF THE COURT OF APPEALS

This court has jurisdiction of this Petition for Review pursuant to Article 8, §3 of the Utah Constitution; Utah Code Ann., §§35A-4-508(8)(a), 78-2a-3(2)(a), 63G-4-403; and Rule 14 of the Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

Is there substantial evidence to support the finding that the claimant voluntarily quit her employment without good cause or that a denial of benefits is not an affront to fairness under the equity and good conscience provisions of the rules?

STANDARD OF REVIEW

This case involves a mixed question of law and fact. "Whether 'good cause' [to quit employment] exists is a mixed question of law and fact." *Denby v. Board of Review*, 567 P.2d 626, 630 (Utah 1977). This Court's review under the Utah Administrative Procedures Act is governed by Utah Code Ann. §63G-4-403 "which provides for appellate relief in the event an agency erroneously interprets or applies the law." *Adams v. Board of Review*, 776 P.2d 639, 641 (Utah 1989).

Resolution of the issues in this case requires the interpretation of two statutory provisions. The first, Utah Code Ann. §35A-4-405(1)(a) (2007) provides that a claimant is ineligible for benefits if he "left work voluntarily without good cause, if so found by the division, . . ." The Utah Supreme Court held, in *Robinson v. Department of Employment Sec.*, that the statutory language in question

explicitly grants the [division] discretion to determine issues involving voluntariness and good cause. Accordingly, in reviewing these issues, we defer to the agency and we will not overturn its decisions regarding voluntariness and good cause unless we determine it has abused its discretion. *Robinson v. Department of Employment Sec.* 827 P.2d 250, 252 (Utah Ct. App. 1992).

The second statutory provision is Utah Code Ann. §35A-4-405(1)(b) (2007) which provides that

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 equity and good conscience standard

requires the Board to consider factors such as 'the reasonableness of the claimant's actions' and 'continuing attachment to the labor market.' Because the statute does not further define these terms, and because the terms are broad and generalized, the statute implicitly grants the Board discretion to interpret the terms in determining equity and good conscience. . . . We therefore apply a reasonableness standard to this issue also. *Id.* at 254. [referring to what is now §35A-4-405(1)(c)]

See also *Morton Int'l v. Auditing Div. Of Utah State Tax Comm'n.*, 814 P.2d 581, 588 (Utah 1991).

Under the reasoning in *Robinson* and in *Morton*, this court should grant deference to the Workforce Appeals Board and not overturn its decision absent a finding of an abuse of discretion.

STATUTES AND REGULATORY PROVISIONS AT ISSUE

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

§35A-4-405(1), Utah Code Annotated (2007)
§63-46b-16(4)(b), Utah Code Annotated (2007), now §63G-4-403 (2008)
§78A-4-103, Utah Code Annotated (2007)
R994-405-101, Utah Administrative Code (2008)
R994-405-102, Utah Administrative Code (2008)
R994-405-103, Utah Administrative Code (2008)
R994-405-201, Utah Administrative Code (2008)
R994-405-208(4), Utah Administrative Code (2008)

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

The claimant, Jennica E. Caldwell, filed a claim for unemployment insurance benefits on January 28, 2009, with an effective date of January 25, 2009. An initial decision by a Department of Workforce Services (Department) adjudicator denied benefits on the grounds the claimant voluntarily quit her employment without good cause and that benefits could not be allowed under the equity and good conscience standard in accordance with Utah Code Ann. §35A-4-405(1). The Department's original decision was issued on March 3, 2009. (See Addendum B) The claimant appealed that decision to an Administrative Law Judge (ALJ) and an evidentiary hearing was held on April 14, 2009. On April 15, 2009, the ALJ issued a decision affirming the Department's original decision denying benefits. (See Addendum C) The claimant appealed the decision of the ALJ to the Workforce Appeals Board (Board). In

a decision issued June 30, 2009, the Board upheld the ALJ's decision denying unemployment benefits. A request for reconsideration by the Board was denied in a decision dated August 5, 2009. (See Addendum D) The claimant's petition for review was filed September 2, 2009.

B. Statement of the Facts.

The claimant, Jennica E. Caldwell, started working for the employer, Macey's, Inc., on about February 20, 2008, as a freight crew member. Her last day worked was January 8, 2009. (Record, 24:16) On January 8, 2009, when the claimant's work shift ended, the claimant went to talk to her supervisor. The claimant followed her supervisor to his truck to discuss concerns she had about work. (R, 24:27-28) The claimant believed the supervisor treated her unfairly. (R, 25:5-6) The claimant asked her supervisor why he was "being such and [sic] asshole" and asked him "should I press my lips on your ass?" (R, 35:10-11; 22-24) The claimant's supervisor told the claimant he did not have to deal with this and told the claimant she should leave the work site and go home. The supervisor further told the claimant he would report her conduct to "upper management" and they would contact the claimant if she was to come back to work. (R, 35:27-28) The claimant asked if she came back anyway what would happen, and the supervisor replied she may be working for free. (R, 37:30-32)

The claimant's supervisor reported the claimant's behavior to the upper management. A member of the management team attempted to contact the claimant by telephone to set up a meeting between the claimant and her supervisor to resolve their differences. (R, 38:44;

20:16-18) The employer was unable to reach the claimant by phone and left a message for the claimant to contact the employer. The claimant did not contact the employer alleging she did not receive the message. When the employer did not hear from the claimant, it decided she quit. (R, 39:20-22) The claimant testified the employer had a grievance procedure but she did not file a grievance. (R, 26:3-8) She testified she did not file a grievance because she was too embarrassed and humiliated to have further contact with the employer. (R, 26:16, 26:25-27, 27:37-39)

SUMMARY OF ARGUMENTS

There is substantial evidence in the record to show the claimant voluntarily quit without good cause, making her ineligible for unemployment benefits. The denial of benefits to the claimant was not contrary to equity and good conscience. Even if it was determined the claimant was discharged she would still be ineligible for unemployment benefits. The claimant failed to meet her burden of marshaling the evidence as required under *Heinecke v. Dept. of Commerce*, 810 P.2d 459, 464 (Utah App. 1991). The ALJ and the Board adjudicated all relevant issues, and none of the decisions issued was arbitrary or capricious.

ARGUMENT

POINT I

THE ALJ AND THE BOARD FOUND THE EMPLOYER'S WITNESSES MORE CREDIBLE THAN THE CLAIMANT. THAT CREDIBILITY DETERMINATION SHOULD BE UPHELD.

The claimant argues on appeal that she did not quit her position but rather she was discharged. The Board found she quit by not returning the employer's telephone call and by

not contacting the employer after she was placed on suspension. The claimant had a verbal altercation in the parking lot with her supervisor. This occurred after work and the supervisor told the claimant he did not want to deal with it then and there. The claimant persisted and used inflammatory language directed at her supervisor. Alarmed by the claimant's insubordinate and inappropriate language, the supervisor testified he told the claimant to leave and she would be contacted about returning to work. The employer's witnesses testified that after the incident, several unsuccessful attempts were made to reach the claimant by telephone and a message was left on the claimant's voice mail instructing her to contact the employer to set up a meeting.

The claimant testified her supervisor told her she was fired. She testified the employer has a formal grievance procedure but she did not avail herself of the process because the supervisor "hurt [her] feelings" during the discussion on her last day of work. The claimant also testified that the employer did not call her after the incident. She testified she kept her telephone with her because she was waiting for a call from the employer. She testified she did not start looking for a new job for a few days after the incident because she was not sure "it was real". She testified she did not contact the employer because she was too embarrassed and humiliated after the final incident with her supervisor.

The ALJ found that employer's witnesses were more credible than the claimant on the reason for the separation and the circumstances surrounding the separation. The ALJ specifically found that the claimant used inappropriate language in the discussion with her

supervisor, that the claimant was told she was suspended not discharged, and that the employer attempted to contact her by telephone about coming back to work.

Unemployment insurance hearings, like many adversarial hearings, involve two or more opposing parties who purport to have the only accurate version of events, yet whose stories differ—sometimes significantly. For this reason, a judge is tasked with the responsibility to hear testimony, consider evidence, and then determine which party is most credible—in other words, determine which version of events is most likely true. Since the ALJ is in the unique position of being an active participant in the hearing, interacting with the parties and also questioning the witnesses, the ALJ is the appropriate authority to make determinations regarding credibility. Those determinations should not be disturbed on appeal short of clear evidence of abuse. As this court has held: "It is for the administrative agency, and not this court, to choose between conflicting facts." *Salt Lake City Corp. v. Department of Emp. Sec.*, 657 P.2d 1312 (Utah, 1982).

It is not unusual in unemployment cases for the employer and the claimant to have completely different versions of what led to the job separation. In many cases, the claimant believes he or she was fired while the employer believes the claimant quit. The ALJ must determine which party was the moving party in causing the job separation. Here the ALJ found that the claimant was the moving party. The Board upheld that determination as there is ample evidence in the record to support that credibility finding.

The claimant's testimony as to what she said to her supervisor during the January 8 meeting was confusing and contradictory. When asked, during cross examination, if she

remembered what she said, she first testified she did not remember. When asked if she called her supervisor an asshole she testified: "No, I absolutely don't recall that." (R, 31:15). When asked to review the January 8 memo (R, 9) prepared by her supervisor about the incident the following exchange occurred (R, 31:41-43; 32:1-2):

CLAIMANT I do not recall any of that. I can't even imagine that.

CLARK So the conversation was – didn't use any of that kind of language, correct?

CLAIMANT No. But it wouldn't matter anyway because we have talked like that to each other before.

First the claimant testified she did not recall what she said during the meeting. Then she denied calling her supervisor an asshole. Finally she testified she and the supervisor talked like that to each other before.

In contrast, the supervisor's testimony was consistent throughout these proceeding and identical to the memo he prepared the day after the event. This consistency makes the supervisor's testimony more convincing regarding what was said by the parties on the claimant's last day of work.

The claimant's supervisor testified he told the claimant she should go home and it was his intent to report her conduct upper management. ~~He testified he told her~~ she would be contacted about whether she should come back to work. The claimant, in contrast, testified she was never told she would be contacted. (R, 33:22-26) The claimant's testimony regarding whether the supervisor told her she would be contacted by the employer is not consistent with her actions. She testified that after the January 8, 2009, incident she kept her telephone with

her because she expected a telephone call, apparently from the employer. She also testified she did not start looking for a new job for a few days because she wanted to make sure "it was real." She did not file a claim for unemployment benefits until January 28, 2009, nearly three full weeks after her last day of work. Finally, she did not file a grievance with the employer. If the claimant truly believed she was wrongly discharged on January 8, 2009, she would have filed a grievance, immediately filed a claim for unemployment benefits, and immediately started looking for new work. If she is to be believed and the supervisor did not tell her she would be called by the employer, why did she testify she kept her telephone with her at all times because she expected a call from the employer? The claimant knew she had only been suspended and not discharged.

The claimant alleges on appeal that the documentation submitted by the employer to the Department, specifically, the official notice of claim filed, shows that she was discharged for insubordination and the "discharge" box was marked by the employer on that form. The claimant argues that the discrepancies between that document and the testimony presented at the hearing "proves that [the employer's] account of the events are [sic] inaccurate and their paperwork goes against their verbal testimony."

The claimant fails to state that in conjunction with marking the "discharge" box on the form in question, the employer also wrote the words: "see attached." Attached to that form is the memo (R, 8 and 9) written by the claimant's supervisor and discussed during the hearing. That memo supports the employer's version of events. The memo states that at the conclusion of the January 8, 2009, conversation, the supervisor told the claimant to go home.

He also told her he was going to report her behavior to upper management and upper management would contact the claimant about coming back to work. The attached memo modifies and explains the notation on the form to show it was a quit, not a discharge.

The Department is charged with the responsibility of determining the reason for the separation under its rules. How the parties classify the job separation is largely irrelevant. The Department, the ALJ, and the unanimous Board found the claimant quit under Department rules. It is noted the document in question is signed by an individual who did not participate in the hearing and perhaps did not have all of the information available about this case. Finally, even if the Board had found that the claimant was discharged instead of quitting, benefits would be denied.

To deny benefits in a discharge, the employer would have to prove just cause under Department rule R994-405-201. (See Addendum A) Insubordination is grounds for discharge under Department rule R994-405-208(4). Calling your supervisor "an asshole", asking him if he wanted you to "put your lips on his ass," and refusing to leave when asked to is insubordinate behavior. The Department would have found that the employer proved all three elements of just cause: knowledge, control, and culpability.

A job separation is determined to be a quit when the claimant is the moving party in determining when the job ends. *Arrow Legal Solutions Group, P.C. v. Dep't of Workforce Servs.*, 2007 UT App 9. Here, there is no evidence the employer intended to end the employment relationship and, indeed, the employer attempted to contact the claimant after the January 8, 2009, incident to discuss the matter. The claimant's failure to return the

employer's telephone call or otherwise show that she was interested in keeping her job was the proximate cause of the separation, not any action by the employer.

The claimant quit by not contacting the employer after the January 8 incident. The employer did not discharge the claimant. The credibility determination is supported by the overwhelming weight of the evidence.

POINT II

THE CLAIMANT DID NOT ESTABLISH GOOD CAUSE FOR VOLUNTARILY QUITTING HER EMPLOYMENT, AND A DENIAL OF BENEFITS IS NOT CONTRARY TO EQUITY AND GOOD CONSCIENCE.

When a claimant voluntarily quits employment, the claimant bears the burden of proving she either had good cause for severing the employer relationship, or that it would be an affront to fairness to deny benefits under the equity and good conscience standard under the provisions of 35A-4-405(1)(a). (See Addendum A) The claimant failed to meet her burden of proof.

The good cause provision, Department rule R994-405-102, provides that a claimant must show that an immediate severance of the employment relationship was necessary to avoid a hardship the claimant did not have the ability to control or prevent. (See Addendum A)

The rule requires that a claimant first show that remaining employed would have had an adverse effect causing an "actual or potential physical, mental, economic, personal or professional harm . . . [as] measured against the actions of an average individual, not one

who is unusually sensitive." The claimant testified that she believed she was being treated unfairly and did not want further contact with the employer, or any of the employees who still worked for the employer, because she was embarrassed about having been discharged or by the way she believed she had been treated. There is no evidence that the claimant suffered actual or potential harm by remaining employed or by calling the employer to learn of her status. An average person, one who was not unusually sensitive, would have taken steps to preserve her job. If the claimant believed her supervisor treated her unfairly she had alternatives to quitting, including discussing her concerns about being treated unfairly with management personnel or filing a grievance. While the claimant testified she did not receive any communication from the employer after the argument with her supervisor, a reasonable person would have overcome her embarrassment and initiated contact to ascertain her employment status and possibly retain her job.

The good cause rule also requires a showing that the complained of problems were beyond the claimant's ability to control or prevent. The claimant must show that the situation was so egregious that it was impossible to continue working while she found another job, that there were no reasonable alternatives to quitting, and that the employer was given notice and an opportunity "to make changes that would eliminate the need to quit. An employee with grievances must have made a good faith effort to work out the differences with the employer before quitting unless those efforts would have been futile."

The claimant had the ability to control or prevent her alleged grievances. The claimant had alternatives available but instead chose to confront her supervisor in an insubordinate manner, using profanity to express her dissatisfaction. Even if she believed

she had been discharged, she had avenues available to her to control the situation. If, as the claimant alleges, she was treated and/or discharged unfairly by her supervisor, she could have filed a grievance. Absent that, she could have contacted upper management to discuss her concerns. She failed to do either. Her failure to follow up on the matter with the employer was not reasonable.

This court has consistently held that "unemployment compensation is legislatively created to ameliorate the hardship of those who, through no fault of their own, find themselves unemployed." *Swiecicki v. Department of Employment Sec.*, 667 P.2d 28, 30 (Utah 1983) The court has also held "the termination is considered voluntary if it was 'at the volition of the employee, in contrast to a firing or other termination at the behest of the employer.'" *Adams v. Board of Review*, 776 P.2d 639, 641 (Utah Ct. App. 1989). The claimant is not unemployed through no fault of her own.

As this court stated in *Slane v. Department of Workforce Services, et. al.*, 2000 UT App 67, ¶3, "having a 'good reason' to quit and having 'good cause' to quit are not the same thing." It is not at all clear the claimant even had a good reason to quit, let alone good cause. The claimant has failed to meet her burden to establish that any of the elements of a voluntary quit with good cause were met.

According to the Utah Administrative Code, if good cause is not established, the claimant's eligibility must be considered under the equity and good conscience standard under Department rule R994-405-103. (See Addendum A)

The equity and good conscience standard has three components. A claimant must first show that "there were mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness . . ." Here the claimant wanted to discuss her problems with her supervisor. She followed him to his truck as he was leaving work and made inappropriate and insubordinate comments to her supervisor. When the supervisor told the claimant he did not want to discuss the matter then and there, the claimant, instead of leaving and trying to talk to her supervisor at a better time, continued her inappropriate conduct. At that point she was told to leave and was told the employer would be in contact with her. The employer tried to contact her and left a message. The claimant did not attempt to contact the employer claiming she was embarrassed and humiliated. These are not the type of mitigating circumstances contemplated by the rule.

Next, the rule requires that the claimant show that the decision to quit was reasonable. Reasonable is defined as: "logical, sensible, or practical. There must be evidence of circumstances which . . . would have motivated a reasonable person to take similar action." The claimant's actions in quitting were not logical, sensible, or practical. When she left the employer's premises following the discussion with her supervisor, she had reason to expect management would be contacting her shortly to further discuss her concerns. A reasonable person would have taken steps to contact the employer to confirm her employment status when no such contact had been made within a short period of time.

Finally, the claimant must prove a continuing attachment to the labor market. The claimant testified she was performing a job search during the hearing. She is presumably attached to the labor market.

This court has held that the

equity and good conscience provision is not an occasion for a free-wheeling judicial foray into the record and imposition of a decision consistent with this panel's collective sense of equity and fairness. On the contrary, that determination is one for the Department and ultimately the Board of Review, *see* Utah Code Ann. §35-4-5(a) (1987), [now §35A-4-405(1)(b)] with this court's role limited, as explained above, to deciding whether the findings support a decision that "equity and good conscience" do not require compensation and whether "evidence of any substance" supports the findings. We are obliged to give considerable deference to the Board's determination of whether equity requires compensation. Moreover, the concept is not as wide-open as it might seem, but rather has been defined and refined by statute, *id.*; by rule, Utah Administrative Code R475-5a-3 (1988); and by case law, *e.g.*, *Chapman v. Industrial Comm'n*, 700 P.2d 1099, 1101-02 (Utah 1985); *Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1317 (Utah 1982).

Chapman v. Industrial Comm'n, 700 P.2d 1099 (1985) is the only case this author can find where Utah's appellate courts reversed a Board decision and allowed benefits under the equity and good conscience provision. In that case, the claimant was a 62-year-old woman who proved that her supervisor was erratic, swore at the claimant, accused the claimant of doing things she had not done, and "subjected the claimant to unreasonable fits of anger." The Board denied benefits finding the claimant had an obligation to notify someone in upper management about the problem with the supervisor. The claimant in *Chapman* testified that she did not report the supervisor to upper management because the supervisor was in ill health and the claimant did not want to be the cause of the supervisor losing her job. The

Utah Supreme Court found that, given the claimant's age, the intolerable supervisor, and the claimant's explanation for not reporting the supervisor, a denial of benefits would be an affront to fairness.

This case is very different. In *Chapman* the ALJ found that the supervisor's treatment of the claimant was unacceptable. There is no such finding here. Here the supervisor told the claimant he did not want to discuss the problem in the parking lot at the end of the day. Additionally, the claimant in this case engaged in inappropriate and insubordinate conduct by asking her supervisor if he expected her to "press her lips to his ass" and telling the supervisor he was "an asshole." There was no finding that the claimant in *Chapman* behaved inappropriately. Finally, the claimant presented no reason for not reporting her supervisor to upper management if she believed she had been treated unfairly. A denial of benefits is not an affront to fairness.

POINT III

THE CLAIMANT ATTEMPTS TO INTRODUCE EVIDENCE THAT WAS NOT PRESENTED DURING THE HEARING IN THIS MATTER.

The claimant provided her phone records for the first time when she filed her appeal to the Board. The claimant argues that these records show that the employer did not attempt to call her in the days after January 8, 2009. The Board refused to consider these phone records because they were not provided during the hearing. When the claimant filed her first appeal, dated March 15, 2009, she knew that the employer was alleging it attempted to

contact her after January 8, 2009. The claimant thus knew, prior to the hearing, that her phone records could be relevant.

Prior to the hearing the parties were sent an appeal brochure explaining the hearing procedure. The brochure also advises parties on how to prepare for a hearing and says, in part:

Preparation for the Hearing

The hearing before the ALJ is your **only** chance to present everything relevant to the case. A record of the hearing will be made, and the ALJ may consider only the evidence introduced during this hearing. Further review and decisions on appeal are limited solely to the evidence introduced at this hearing. Take time to prepare for your hearing. Know the issue or issues involved. Obtain documents that help prove your facts and provide them to the ALJ and opposing party. Also, be sure to line up witnesses which support your side of the case. [emphasis in original]

The parties were also sent an instruction sheet entitled "Hearing Notice Instructions."

That sheet states, in part:

PREPARING FOR THE HEARING:

In order for the Judge to make the best decision, the judge must hear all of the relevant information about the issues listed on the Notice of Hearing. Be prepared to present all the information you want the Judge to consider. . . .

DOCUMENTS: Enclosed are documents that may be made part of the hearing record. . . .

If you have additional documents to be considered by the Judge, you **MUST** mail, fax, or hand-deliver the documents to the Judge and **all other parties** before the hearing. . . .

Documents not provided in a timely manner may not be considered by the Judge.

**IF YOU HAVE ANY QUESTION PERTAINING TO THE HEARING,
CALL THE APPEALS UNIT AT 801-526-9300 or 877-800-0671.**
[emphasis in original]

The ALJ also told the parties, at the beginning of the hearing, to be sure and present all the evidence the party wanted to be considered during the hearing. Department rules provide:

R994-508-305. Decisions of the Board.

. . .

(2) Absent a showing of unusual or extraordinary circumstances, the Board will not consider new evidence on appeal if the evidence was reasonably available and accessible at the time of the hearing before the ALJ.

When the claimant presented the phone records for the first time with her appeal to the Board, the Board sent her a letter asking her to explain why she did not provide the records at the time of the hearing. The claimant did not respond to that letter. The phone records were available to the claimant at the time of the hearing, the claimant was on notice that it would be an issue at the hearing, and the claimant failed to provide any evidence of extenuating circumstances which would allow the documents to be admitted after the hearing.

The employer was not given an opportunity to review the alleged phone records or to present rebuttal evidence to those records. The Board properly refused to consider that evidence and so should this court. It would be a denial of the employer's due process rights to accept this new evidence at this point.

POINT IV

THE CLAIMANT HAS NOT MARSHALED THE EVIDENCE IN SUPPORT OF THE FACTUAL FINDINGS OF THE WORKFORCE APPEALS BOARD.

The finding that the claimant did not have good cause for quitting was based on competent evidence in the record, primarily, the testimony of the claimant and the employer. In order to successfully challenge this finding, the claimant "must demonstrate that the findings are not supported by substantial evidence when viewed in light of the whole record before the court." The court should reject the claimant's appeal for her failure to marshal the evidence in support of her conclusion that the findings were without foundation. The Board recognizes that the claimant is proceeding pro se and might not be held to the strict procedural standards expected of claimants who are represented by counsel. However, the burden when challenging a factual finding is an extremely heavy one and the claimant has presented no evidence or arguments sufficient to overcome this burden.

In *Crockett v. Crockett*, 836 P.2d 818 (Utah App. 1992), the court refused to entertain the appellant's factual challenges since the appellant failed to meet its marshaling burden:

[The Appellant] has neither marshaled the evidence in support of the finding nor demonstrated that the finding is clearly erroneous, but instead cites only evidence that supports the outcome she desires. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991) (citing only evidence favorable to one's position "does not begin to meet the marshaling burden. . ."). **We therefore assume that the record supports the finding of the trial court.** *Id.* at 820. [Emphasis added]

This court expanded upon the appellant's burden to marshal the evidence in *Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.*, 872 P.2d 1051 (Utah App. 1994):

Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. *Id.* at 1052.

The court reasoned that to successfully appeal a trial court's findings of fact, "appellate counsel must play the devil's advocate. '[Parties] must extricate [themselves] from the client's shoes and fully assume the adversary's position.'" *Id.* at 1053, citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991). The court further explained that proper marshaling requires the challenger to:

... present in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991); accord *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 36 (Utah App. 1993); *Ohline Corp. v. Granite Mill*, 849 P.2d 602, 604 (Utah App. 1993). *Oneida* at 1053.

Then, after an appellant has established:

... every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. *West Valley City*, 818 P.2d at 1314. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Bartell*, 776 P.2d at 886 (quoting *Walker*, 743 P.2d at 193). *Oneida* at 1053.

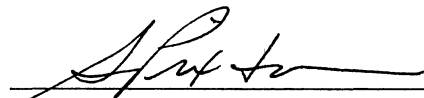
The claimant here has made no attempt to meet her marshaling burden. She has pointed to no evidence in the record to show that the findings of the Board are so "against the clear weight of the evidence" that they are "clearly erroneous." The record below is supported by the evidence and entitled to a presumption of validity. See also *Grace Drilling Company v. Board of Review*, 776 P.2d 63, 67-68 (Utah Ct. App. 1989), where this court held that

. . . the 'whole record test' necessarily requires that a party challenging the Board's findings of fact must marshal all of the evidence supporting the findings and show that despite the . . . contradictory evidence, the findings are not supported by substantial evidence.

CONCLUSION

The claimant has raised no competent argument in support of her appeal. This court should, therefore, affirm the decision of the Board disqualifying the claimant from the receipt of unemployment benefits, pursuant to §35A-4-405(1) of the Utah Employment Security Act.

Respectfully submitted this 5th day of April, 2010.



SUZAN PIXTON
Attorney for Respondent
Workforce Appeals Board
Department of Workforce Services

CERTIFICATE OF MAILING

I CERTIFY that I mailed two copies of the foregoing Respondent's Brief, postage prepaid, to the following this 5th day of April, 2010:

JENNICA E CALDWELL
6991 SOUTH HIGHWAY 165
HYRUM UT 84319

MACEYS INC
% EMPLOYER ADVOCATES INC
PO BOX 25236
SALT LAKE CITY UT 84125-0236

A handwritten signature in black ink, appearing to read "Shirley", is written over a horizontal line.

35A-4-405. Ineligibility for benefits.

Except as otherwise provided in Subsection (5), an individual is ineligible for benefits or for purposes of establishing a waiting period:

(1)(a) For the week in which the claimant left work voluntarily without good cause, if so found by the division, 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.

(b) A claimant may not be denied eligibility for benefits if the claimant leaves work under circumstances where it would be contrary to equity and good conscience to impose a disqualification.

(c) Using available information from employers and the claimant, the division shall 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.

(d) Notwithstanding any other subsection of this section, a claimant who has left work voluntarily to accompany, follow, or join the claimant's spouse to or in a new locality does so without good cause for purposes of Subsection (1).

...

63G-4-403. Judicial review -- Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(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.

78A-4-103. Court of Appeals 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, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

R994-405-102. Good Cause.

To establish good cause, a claimant must show that continuing the employment would have caused an adverse effect which the claimant could not control or prevent. The claimant must show that an immediate severance of the employment relationship was necessary. Good cause is also established if a claimant left work which is shown to have been illegal or to have been unsuitable new work.

(1) Adverse Effect on the Claimant.

(a) Hardship.

The separation must have been motivated by circumstances that made the continuance of the employment a hardship or matter of concern, sufficiently adverse to a reasonable person so as to outweigh the benefits of remaining employed. There must have been actual or potential physical, mental, economic, personal or professional harm caused or aggravated by the employment. The claimant's decision to quit must be measured against the actions of an average individual, not one who is unusually sensitive.

(b) Ability to Control or Prevent.

Even though there is evidence of an adverse effect on the claimant, good cause will not be found if the claimant:

(i) reasonably could have continued working while looking for other employment,

(ii) had reasonable alternatives that would have made it possible to preserve the job like using approved leave, transferring, or making adjustments to personal circumstances, or,

(iii) did not give the employer notice of the circumstances causing the hardship thereby depriving the employer of an opportunity to make changes that would eliminate the need to quit. An employee with grievances must have made a good faith effort to work out the differences with the employer before quitting unless those efforts would have been futile.

(2) Illegal.

Good cause is established if the claimant was required by the employer to violate state or federal law or if the claimant's legal rights were violated, provided the employer was aware of the violation and refused to comply with the law.

(3) Unsuitable New Work.

Good cause may also be established if a claimant left new work which, after a short trial period, was unsuitable consistent with the requirements of the suitable work test in rule R994-405-306. The fact the claimant accepted a job does not necessarily make the job suitable. The longer a job is held, the more it tends to negate the argument that the job was unsuitable. After a reasonable period of time a contention the quit was motivated by unsuitability of the job is generally no longer persuasive. The Department has an affirmative duty to determine whether the employment was suitable, even if the claimant does not raise suitability as an issue.

R994-405-103. Equity and Good Conscience.

(1) If the good cause standard has not been met, the equity and good conscience standard must be considered in all cases except those involving a quit to accompany, follow, or join a spouse as provided in R994-405-104. If there are mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness, benefits may be allowed under the provisions of the equity and good conscience standard if the claimant:

(a) acted reasonably.

The claimant acted reasonably if the decision to quit was logical, sensible, or practical. There must be evidence of circumstances which, although not sufficiently compelling to establish good cause, would have motivated a reasonable person to take similar action, and,

(b) demonstrated a continuing attachment to the labor market.

A continuing attachment to the labor market is established if the claimant took positive actions which could have resulted in employment during the first week subsequent to the separation and each week thereafter. An active work search, as provided in R994-403-113c, should have commenced immediately after the separation whether or not the claimant received specific work search instructions from the Department. Failure to show an immediate attachment to the labor market may not be disqualifying if it was not practical for the claimant to seek work. Some circumstances that may interfere with an immediate work search include illness, hospitalization, incarceration, or other circumstances beyond the control of the claimant provided a work search commenced as soon as practical.

R994-405-201. Discharge - General Definition.

A separation is a discharge if the employer was the moving party in determining the date the employment ended. Benefits will be denied if the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which was deliberate, willful, or wanton and adverse to the employer's rightful interest. However, not every legitimate cause for discharge justifies a denial of benefits. A just cause discharge must include some fault on the part of the claimant. A reduction of force is considered a discharge without just cause.

R994-405-208. Examples of Reasons for Discharge.

In the following examples, the basic elements of just cause must be considered in determining eligibility for benefits.

. . .

(4) Insubordination.

An employer generally has the right to expect lines of authority will be followed; reasonable instructions, given in a civil manner, will be obeyed; supervisors will be respected and their authority will not be undermined. In determining when insubordination becomes disqualifying conduct, a disregard of the employer's rightful and legitimate interests is of major importance. Protesting or expressing general dissatisfaction without an overt act is not a disregard of the employer's interests. However, provocative remarks to a superior or vulgar or profane language in response to a civil request may constitute insubordination if it disrupts routine, undermines authority or impairs efficiency. Mere incompatibility or emphatic insistence or discussion by a claimant, acting in good faith, is not disqualifying conduct.

UNEMPLOYMENT INSURANCE
DECISION OF ELIGIBILITY FOR
UNEMPLOYMENT INSURANCE BENEFITS



DATE MAILED: 3/3/09

VQPR

JENNICA E CALDWELL
415 E 500 S
LOGAN UT 84321-5519

SSN: XXX-XX-X625
EMPLOYER: MACEYS INC

Decision: This decision is made on your claim for benefits:

You voluntarily left your job for personal reasons which you have not shown to be compelling.

You did not establish good cause for leaving by showing that staying in this job would cause sufficient hardship to make it necessary for you to quit before finding another job or that you had no reasonable alternative to quitting.

Benefits cannot be allowed under the equity and good conscience provision because you have not shown that your reasons for leaving were sufficiently mitigating and/or you have not demonstrated a continuing attachment to the labor force.

Benefits are denied under Section 35A-4-405(1) of the Utah Employment Security Act beginning January 25, 2009 and ending March 18, 2009 because you have not shown that you have earned wages in bona fide covered employment equal to at least six times your weekly benefit amount and you are otherwise eligible. To reopen your claim, you can file online at jobs.utah.gov or you can call the Claim Center. This reopening will be effective as of the week you reopen your claim. You will be notified separately of any other issues on your claim.

RIGHT TO APPEAL: If you believe this decision is incorrect, appeal by mail to: Utah Department of Workforce Services, Appeals Division, PO Box 45244, Salt Lake City, UT 84145-0244, or Fax (801) 526-9242, or online at www.jobs.utah.gov. Your appeal must be in writing and must be received or postmarked on or before March 18, 2009. An appeal received or postmarked after March 18, 2009 may be considered if good cause for the late filing can be established. Your appeal must be signed by you or your legal representative. **MAKE SURE YOUR NAME IS WRITTEN LEGIBLY AND THAT YOU INCLUDE YOUR SOCIAL SECURITY NUMBER AND CURRENT ADDRESS.** Also, please state the reason for your appeal. A copy of your appeal will be sent to any interested parties. It is very important for you to continue to file your weekly claims while the appeal process is pending. You will not be paid for any weeks not filed timely unless you can show good cause for late filing.

UTAH CLAIMS CENTER PHONE NUMBERS: S.L.: 526-4400, Ogden: 612-0877, Provo: 375-4067, Out of Area: (888) 848-0688.

FOR: J Fruin

EMP.#: 1000507

DO NOT WRITE BELOW THIS LINE



6069750

Exhibit 12

012

Form APDEC
01

DEPARTMENT OF WORKFORCE SERVICES
APPEALS UNIT

Decision of Administrative Law Judge

Appellant

JENNICA E CALDWELL
415 E 500 S
LOGAN UT 84321-5519

Respondent

MACEYS INC
% EMPLOYER ADVOCATES LLC
PO BOX 25236
SALT LAKE CITY UT 84125-0236

S.S.A. NO: XXX-XX-3625

CASE NO: 09-A-04147

APPEAL DECISION: Benefits are denied.
The Employer is relieved of charges.

CASE HISTORY:

Appearances:	Claimant /Employer	
Issues to be Decided:	35A-4-405(1)	- Voluntary Quit
	35A-4-405(2)(a)	- Discharge
	35A-4-307	- Employer Charges

The original Department decision denied unemployment insurance benefits on the grounds the Claimant was discharged for disqualifying reasons. That decision also relieved the Employer's benefit ratio account for benefits paid to the Claimant.

APPEAL RIGHTS: The following decision will become final unless, within **30 days** from **April 15, 2009**, further written appeal is received by the Workforce Appeals Board (PO Box 45244, Salt Lake City, UT 84145-0244; FAX 801-526-9244; or online at <http://www.jobs.utah.gov/appeals>) setting forth the grounds upon which the appeal is made.

FINDINGS OF FACT:

Prior to filing a claim for unemployment insurance benefits against the state of Utah effective January 25, 2009, the Claimant last worked as a freight crew member for Maceys Inc. from February 20, 2008, to January 8, 2009.

On January 8, 2009, when the Claimant's work shift ended, the Claimant went to talk to her supervisor. The Claimant followed her supervisor to his truck to discuss her concerns. The Claimant was concerned that she did "three times as much work" as anyone else, and that she did not care for the way her supervisor gave her

orders. The Claimant asked her supervisor why he was "being such and asshole" and also remarked "should I press my lips on your ass". The Claimant's supervisor told the Claimant he did not have to deal with this and told the Claimant she should leave the work site and go home. The supervisor further told the Claimant he would speak with upper management and they would contact the Claimant if she was to come back to work. The Claimant asked if she came back anyway what would happen, and the Claimant's supervisor replied she may be working for free.

The Claimant's supervisor reported the Claimant's behavior to the Employer. The Employer attempted to phone the Claimant to set up a meeting between the Claimant and her supervisor to resolve their differences. The Claimant did not receive the Employer's phone call. The Employer did not hear again from the Claimant.

REASONING AND CONCLUSIONS OF LAW:

Section 35A-4-405(1) of the Utah Employment Security Act provides that an individual is ineligible for benefits or for purposes of establishing a waiting period if the Claimant left work voluntarily without good cause or if a denial of benefits would not be contrary to equity and good conscience. The Unemployment Insurance Rules pertaining to this section provide, in part:

The Unemployment Insurance Rules pertaining to Section 35A-4-405(1) of the Utah Employment Security Act provide, in pertinent part:

R994-405-102. Good Cause.

To establish good cause, a claimant must show that continuing the employment would have caused an adverse effect which the claimant could not control or prevent. The claimant must show that an immediate severance of the employment relationship was necessary. Good cause is also established if a claimant left work which is shown to have been illegal or to have been unsuitable new work.

(1) Adverse Effect on the Claimant.

(a) Hardship.

The separation must have been motivated by circumstances that made the continuance of the employment a hardship or matter of concern, sufficiently adverse to a reasonable person so as to outweigh the benefits of remaining employed. There must have been actual or potential physical, mental, economic, personal or professional harm caused or aggravated by the employment. The claimant's decision to quit must be measured against the actions of an average individual, not one who is unusually sensitive.

(b) Ability to Control or Prevent.

Even though there is evidence of an adverse effect on the claimant, good cause will not be found if the claimant:

- (i) reasonably could have continued working while looking for other employment,
- (ii) had reasonable alternatives that would have made it possible to preserve the job like using approved leave, transferring, or making adjustments to personal circumstances, or,
- (iii) did not give the employer notice of the circumstances causing the hardship thereby depriving the employer of an opportunity to make changes that would eliminate the need to quit. An employee with grievances must have made a good faith effort to work out the differences with the employer before quitting unless those efforts would have been futile.

(2) Illegal.

Good cause is established if the claimant was required by the employer to violate state or federal law or if the claimant's legal rights were violated, provided the employer was aware of the violation and refused to comply with the law.

(3) Unsuitable New Work.

Good cause may also be established if a claimant left new work which, after a short trial period, was unsuitable consistent with the requirements of the suitable work test in rule R994-405-306. The fact the claimant accepted a job does not necessarily make the job suitable. The longer a job is held, the more it tends to negate the argument that the job was unsuitable. After a reasonable period of time a contention the quit was motivated by unsuitability of the job is generally no longer persuasive. The Department has an affirmative duty to determine whether the employment was suitable, even if the claimant does not raise suitability as an issue.

R994-405-103. Equity and Good Conscience.

(1) If the good cause standard has not been met, the equity and good conscience standard must be considered in all cases except those involving a quit to accompany, follow, or join a spouse as provided in R994-405-104. If there are mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness, benefits may be allowed under the provisions of the equity and good conscience standard if the claimant:

- (a) acted reasonably.

The claimant acted reasonably if the decision to quit was logical, sensible, or practical. There must be evidence of circumstances which, although not sufficiently compelling to establish good cause, would have motivated a reasonable person to take similar action, and,

- (b) demonstrated a continuing attachment to the labor market.

A continuing attachment to the labor market is established if the claimant took positive actions which could have resulted in employment during the first week subsequent to the

separation and each week thereafter. An active work search, as provided in R994-403-113c, should have commenced immediately after the separation whether or not the claimant received specific work search instructions from the Department. Failure to show an immediate attachment to the labor market may not be disqualifying if it was not practical for the claimant to seek work. Some circumstances that may interfere with an immediate work search include illness, hospitalization, incarceration, or other circumstances beyond the control of the claimant provided a work search commenced as soon as practical.

The Claimant was the moving party in the job separation therefore, the Claimant voluntarily quit employment. The Claimant was sent home from work but she was told she would hear from management regarding her position. The Employer testified, during the hearing, that the Claimant was left a voice mail message to contact the Employer to try and resolve the problems with her supervisor. The Claimant testified, during the hearing, that she did not get the message from the Employer and assumed she was discharged. Although the Claimant may have believed she was discharged, the Claimant should have made an effort to contact management to resolve her concerns. The Claimant testified, during the hearing, that she thought "she would get a call". When the Claimant did not receive a phone call the Claimant should have contacted the Employer to determine her employment status. Because the Claimant made no effort to retain her employment, the Claimant was the moving party in the separation and, and such, voluntarily quit employment.

In a voluntary quit case the burden of proof rests with the Claimant to establish good cause for quitting. For good cause to be established the Claimant must show that continued employment would have an adverse affect on the Claimant, or that the job was illegal, or that the job duties constituted new unsuitable work no harm would have been caused by remaining employed. The Claimant's job was not illegal nor were the Claimant's job duties new unsuitable work. Good cause has not been established.

In this case the Claimant did not act reasonably. The Claimant acted unreasonably when she failed to contact the Employer after she did not hear from the Employer. Because the Claimant acted unreasonably, the equity in good conscience standard does not apply.

An Employer may be relieved of charges when the Claimant was separated from employment for reasons which would have resulted in a denial of benefits under Section 35A-4-405(1) or Section 35A-4-405(2) of the Utah Employment Security Act. In this case the reason for the Claimant's separation is disqualifying, therefore, the Employer is relieved of charges.

DECISION AND ORDER:

The Department's decision denying unemployment insurance benefits pursuant to Section 35A-4-405(1) of the Utah Employment Security Act is affirmed. Benefits are denied effective January 25, 2009, and continuing until the Claimant has returned to bona fide covered employment, earned six times her weekly benefit amount and is otherwise eligible.

Jennica E. Caldwell

- 5 -

09-A-04147

The Employer is relieved of liability for charges in connection with this claim, as provided by Section 35A-4-307 of the Utah Employment Security Act.



Valerie Argyle

Administrative Law Judge

DEPARTMENT OF WORKFORCE SERVICES

Issued: **April 15, 2009**

VA/rs

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

JENNICA E. CALDWELL, CLAIMANT
S.S.A. No. XXX-XX-3625

:

:

Case No. 09-B-00540

MACEYS INC.,
EMPLOYER

:

DECISION OF WORKFORCE APPEALS BOARD:

The decision of the Administrative Law Judge is affirmed.

Benefits are denied.

The Employer is eligible for relief of benefit charges.

HISTORY OF CASE:

In a decision dated April 15, 2009, Case No. 09-A-04147, the Administrative Law Judge affirmed a Department decision and denied unemployment insurance benefits to the Claimant effective January 25, 2009. The Employer, Maceys Inc., was found eligible for relief of benefit charges in connection with this claim.

JURISDICTION OF WORKFORCE APPEALS BOARD:

The Workforce Appeals Board has authority to review the Administrative Law Judge's decision pursuant to §35A-4-508(4) and (5) of the Utah Employment Security Act and the Utah Administrative Code (1997) pertaining thereto.

CLAIMANT APPEAL FILED: May 13, 2009.

ISSUES BEFORE WORKFORCE APPEALS BOARD AND APPLICABLE PROVISIONS OF UTAH EMPLOYMENT SECURITY ACT:

1. Did the Claimant have good cause to quit her employment pursuant to the provisions of §35A-4-405(1)?
2. Is it contrary to equity and good conscience to deny unemployment insurance benefits pursuant to the provisions of §35A-4-405(1)?
3. Is the Employer eligible for relief of charges pursuant to the provisions of §35A-4-307(1)?

09-B-00540

- 2 -

XXX-XX-3625
JENNICA E. CALDWELL**FACTUAL FINDINGS:**

The Workforce Appeals Board adopts in full the factual findings of the Administrative Law Judge.

REASONING AND CONCLUSIONS OF LAW:

The Claimant worked for this Employer as a member of the freight crew for just over ten months. She quit when she failed to return to work after a discussion with her supervisor. The Department and the Administrative Law Judge denied benefits and the Claimant filed this appeal.

The Claimant wanted to talk to her supervisor after her shift ended on January 8, 2009. She saw him in the parking lot and approached him. The Claimant and the supervisor both testified during the hearing providing completely different versions of what occurred during that conversation.

The Claimant testified that she just wanted to talk to him about how she felt he treated her unfairly and she wanted to talk things out. She testified she had talked to him after work in the parking lot before. She testified he started getting angry and said he did not want to talk about it right then. She testified she told him she could "not work like this" and the problem needed to be solved. He then said, according to the Claimant "you're done". The Claimant asked what he meant by that and he said, "you're fired."

The supervisor denied telling the Claimant she was "done" or fired. He testified she asked him why he was "being such an asshole" and that she asked him if she "should press her lips to his ass." The supervisor testified that he told the Claimant he did not have to deal with this type of conversation and the Claimant should go home. He testified he also told the Claimant he was going to talk to upper management about the way she was talking to him and they would contact her about when she should come back to work. He testified the Claimant then asked what would happen if she came to work before she was called and he told her she might be working for free.

The Employer's witnesses testified the Employer attempted to contact the Claimant about coming in for a meeting. The witness testified he was not able to talk directly with the Claimant because she did not answer his telephone but at least one message was left on her phone. The Employer concluded she had quit by not showing up for work or returning the Employer's calls.

The Claimant testified the Employer never called her after the incident in the parking lot. She believed she had been discharged. The Claimant testified she received no messages and no attempts were made to call her.

Whenever two parties give divergent testimony, a credibility determination must be made. It is the duty of the administrative law judge to consider conflicting testimony and determine which party is more credible. Since the Administrative Law Judge is in the unique position of being an active participant in the hearing, interacting with the parties and also questioning the witnesses, the Judge's

credibility finding will usually not be disturbed by the Board. If there is evidence in the record to support the credibility finding made by the Administrative Law Judge, the Board will not substitute its own judgment for that of the Judge unless there is a clear showing of error. Here the administrative law judge found that the Employer's witnesses were more credible than the Claimant. There is ample evidence in the record to support that finding. There is no showing of error.

The Claimant presents her phone records to the Board on appeal. She did not present those records during the hearing in this matter. Prior to the hearing the parties were sent an appeal brochure explaining the hearing procedure. The brochure also advises parties on how to prepare for a hearing and says, in part:

Preparation for the Hearing

The hearing before the ALJ is your **only** chance to present everything relevant to the case. A record of the hearing will be made, and the ALJ may consider only the evidence introduced during this hearing. Further review and decisions on appeal are limited solely to the evidence introduced at this hearing. Take time to prepare for your hearing. Know the issue or issues involved. Obtain documents that help prove your facts and provide them to the ALJ and opposing party. Also, be sure to line up witnesses which support your side of the case. [emphasis in original]

The parties were also sent an instruction sheet entitled "Hearing Notice Instructions". That sheet states, in part:

PREPARING FOR THE HEARING:

In order for the Judge to make the best decision, the judge must hear all of the relevant information about the issues listed on the Notice of Hearing. Be prepared to present all the information you want the Judge to consider. . . .

WITNESSES: If you wish to have someone testify, you must arrange for that person to be available at the time of the hearing. The best witness has **firsthand knowledge** of what he or she is testifying about. . . .

DOCUMENTS: Enclosed are documents that may be made part of the hearing record. . . .

If you have additional documents to be considered by the Judge, you **MUST** mail, fax, or hand-deliver the documents to the Judge and **all other parties** before the hearing. . . .

09-B-00540

- 4 -

XXX-XX-3625
JENNICA E. CALDWELL

Documents not provided in a timely manner may not be considered by the Judge.

IF YOU HAVE ANY QUESTION PERTAINING TO THE HEARING, CALL THE APPEALS UNIT AT 801-526-9300 or 877-800-0671. [emphasis in original]

The administrative law judge also told the parties, at the beginning of the hearing to be sure and present all the evidence the party wants to be considered during the hearing.

Department rules provide:

R994-508-305. Decisions of the Board.

...

(2) Absent a showing of unusual or extraordinary circumstances, the Board will not consider new evidence on appeal if the evidence was reasonably available and accessible at the time of the hearing before the ALJ.

The reason for this rule is that an appeal to the Board is an appeal on the record. That means that the Board reviews the evidence before the administrative law judge and not new evidence. Providing evidence after the hearing deprives the other party of the opportunity to cross examine witnesses and provide rebuttal evidence, if available. The right of cross examination and the right to rebut evidence are important due process rights that must be protected.

Courts and administrative bodies are charged with the responsibility of resolving disputes between individuals. Parties to a lawsuit or administrative procedure have the right to know that the dispute will reach finality at some point in time. To ensure that the rights of all parties are protected, courts and administrative bodies set trials and hearings so that the parties might fully present any and all evidence and arguments in support of their position. After the hearing or trial no new evidence can be accepted except under unusual circumstances as explained in the rule mentioned above. Although the Board understands that to an inexperienced party the rules seem overly technical, those rules are necessary. Many if not most losing parties would want a new hearing to try and present a "better" case. If the Board granted those requests it would unnecessarily delay and burden the hearing process.

Department rules provide:

R994-403-116e. Eligibility Determinations: Obligation to Provide Information.

(1) The Department cannot make proper determinations regarding eligibility unless the claimant and the employer provide correct information in a timely manner. Claimants and employers therefore have a continuing obligation to provide any and all information and verification which may affect eligibility.

(2) Providing incomplete or incorrect information will be treated the same as a failure to provide information if the incorrect or insufficient information results in an improper decision with regard to the claimant's eligibility.

R994-508-109. Hearing Procedures.

...

(9) ... A party has the responsibility to present all relevant evidence in its possession. When a party is in possession of evidence but fails to introduce the evidence, an inference may be drawn that the evidence does not support the party's position.

In addition to the phone records, the Claimant argues additional facts on appeal that were not in evidence in the hearing. The evidence presented by the Claimant on appeal was available at the time of the hearing. The Claimant has not explained any extenuating circumstances which would warrant accepting this new evidence now. The new evidence presented by the Claimant on appeal was not considered in reaching this decision.

The Claimant takes exception in her letter of appeal to the Board with many statements in the decision of the Administrative Law Judge. The Claimant infers things in the Administrative Law Judge which were not said. For instance, the Claimant argues on appeal that nothing had happened during the day at work which led her to approach her supervisor in the parking lot. If nothing had happened that day, it is not clear why the Claimant, according to her own testimony, told her supervisor they needed to talk about her problems right then. It would have been far more appropriate and professional for the Claimant to talk to her supervisor during work hours instead of approaching him in the parking lot after the shift ended.

The Administrative Law Judge found that the Claimant acted unreasonably when she approached her supervisor and used language that was confrontational and unprofessional. This warranted telling the Claimant to leave and await further contact from the Employer. The Employer tried several times to reach the Claimant without success. The Claimant argues on appeal that she did not attempt to contact the Employer because she was humiliated because she thought she had been fired. Even if the Claimant believed she had been fired, she had a responsibility to contact the Employer to ascertain her job status. If she had done nothing wrong, the Claimant would not have felt humiliated by the alleged discharge. The Claimant did not establish good cause to quit.

09-B-00540

- 6 -

XXX-XX-3625
JENNICA E. CALDWELL

A denial of benefits in this case is not an affront to fairness. There are no extenuating circumstances which would allow for an award of benefits in this case. The Claimant's actions were not reasonable.

The reasoning and conclusions of law of the Administrative Law Judge are adopted in full.

DECISION:

The decision of the Administrative Law Judge denying benefits to the Claimant effective January 25, 2009, pursuant to the provisions of §35A-4-405(1) of the Utah Employment Security Act, is affirmed.

The Employer, Maceys Inc., is eligible for relief of benefit charges in connection with this claim as provided by §35A-4-307(1) of the Act.

APPEAL RIGHTS:

Pursuant to §63-46b-13(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person making the request. If the Workforce Appeals Board does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied pursuant to §63-46b-13(3)(b) of the Utah Administrative Procedures Act. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this order. If a request for reconsideration is made, the Workforce Appeals Board will issue another decision. This decision will set forth the rights of further appeal to the Court of Appeals and time limitation for such an appeal.

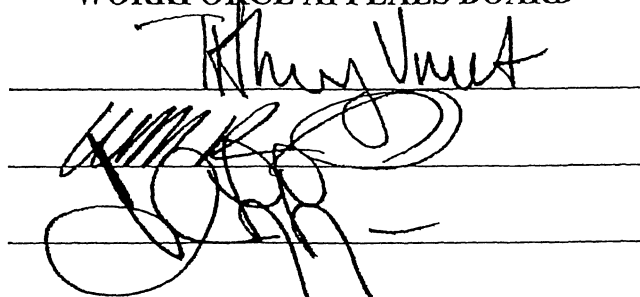
You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. 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 §35A-4-508(8) of the Utah Employment

Security Act; §63-46b-16 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

Date Issued: June 30, 2009

TV/TL/WS/va/sp/ks



Three handwritten signatures are written over three horizontal lines. The top signature is 'Anthony V. ...'. The middle signature is 'J. ...'. The bottom signature is 'J. ...'.

09-B-00540

- 8 -

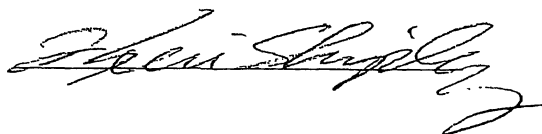
XXX-XX-3625
JENNICA E. CALDWELL

MAILING CERTIFICATE

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 30th day of June, 2009, by mailing the same, postage prepaid, United States mail to:

MACEYS INC
% EMPLOYER ADVOCATES LLC
PO BOX 25236
SALT LAKE CITY UT 84125-0236

JENNICA E CALDWELL
415 E 500 S
LOGAN UT 84321-5519

A handwritten signature in cursive script, appearing to read "Jenni Supply", is written over a horizontal line.

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

JENNICA E. CALDWELL, CLAIMANT
S.S.A. No. XXX-XX-3625

:

Case No. 09-R-00752

:

RECONSIDERATION

MACEYS INC.,
EMPLOYER

:

DECISION OF WORKFORCE APPEALS BOARD:

Claimant's request for reconsideration is denied.

HISTORY OF CASE:

In a letter received July 230, 2009, the Claimant, Jennica E. Caldwell, requested reconsideration of the decision of the Workforce Appeals Board issued in this case on June 30, 2009. The decision of the Workforce Appeals Board was based on a review of a decision of an Administrative Law Judge after a formal hearing.

JURISDICTION OF WORKFORCE APPEALS BOARD:

The Board has jurisdiction to review the request for reconsideration pursuant to Utah Code Annotated §63-46b-13(3) on the grounds that the Board's decision was final agency action within the meaning and intent of that section of law.

DECISION:

The Claimant's request for reconsideration is denied. The decision of the Workforce Appeals Board dated June 30, 2009, remains in effect.

APPEAL RIGHTS:

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. 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 §35A-4-508(8) of the Utah Employment

09-R-00752

- 2 -

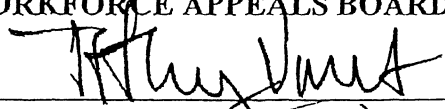
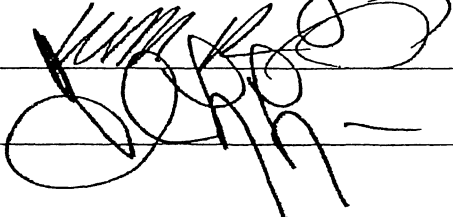
XXX-XX-3625
JENNICA E. CALDWELL

Security Act; §63-46b-16 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

Date Issued: August 5, 2009

TV/WS/TL/va/sp/ks

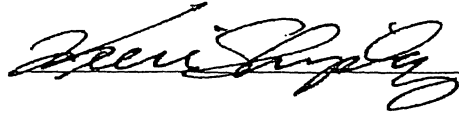



MAILING CERTIFICATE

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 5th day of August, 2009, by mailing the same, postage prepaid, United States mail to:

JENNICA E CALDWELL
415 E 500 S
LOGAN UT 84321-5519

MACEYS INC
% EMPLOYER ADVOCATES LLC
PO BOX 25236
SALT LAKE CITY UT 84125-0236

A handwritten signature in black ink, appearing to read "Jennica E. Caldwell", is written over a horizontal line.

FEB-10-2009 TUE 02:29 PM
DWS-UI
FORM 606
REV 03/08

FAX NO.
UTAH DEPARTMENT OF WORKFORCE SERVICES
UNEMPLOYMENT INSURANCE
OFFICIAL NOTICE OF CLAIM FILED

DWS 02/10/09 02:29 PM
P. 02/03
ADDENDUM E



MACEYS INC 061507-0 JENNICA E CALDWELL 519/25-3625

6. Reason for job separation (Refer to instructions on page 3).

☐ REDUCTION OF FORCE DUE TO LACK OF WORK (This employee will not be replaced.)

☐ VOLUNTARY QUIT (Separation was initiated by the employee.)

A. What reason did the employee give for quitting? _____

B. Was the employee told he/she would be discharged if he/she did not quit?
(If yes, please answer the questions for DISCHARGE below.)

Yes ☐ No ☐

C. Did the employee give advance notice for quitting?

Yes ☐ No ☐

If yes, what is the date that was to be the intended last day of work (date of notice)? ____/____/____

Was the employee paid through the date of notice?

Yes ☐ No ☐

☒ DISCHARGE (Separation was initiated by the employer.)

A. What is the reason this employee was discharged? Insubordination

See attached page

B. How did this employee know that his or her actions causing the discharge were in violation of the employer's policies, rules, standards, or expectations? Please be specific concerning the type, content, and dates of any warnings. (Attach supporting documentation if necessary.) _____

C. How was your company harmed by this employee's actions or behavior which caused the discharge? _____

Please return the completed form to the address on page one by 2/8/09

UM Cyrina Memmott, Claimant 974-5599 2-10-09
Signature Printed Name Title Phone Ext. Date

DO NOT WRITE BELOW THIS LINE



5835125

Exhibit 8

008

FEB-10-2009 TUE 02:29 PM

02/06/2009 18:39 FAX
02:29 PM MIMI > LUCAN

FAX NO.

FAX No. 435 753 3263

P. 003703

WUUCUUC

P. 001/801

January 08, 2009

Jonathan Swartz

Jonathan Swartz

Last night Jennice Caldwell had thrown her candy on her table and her candy per hour was exactly 60, which is the minimum required to throw on a nightly basis. I had asked her if she would go and through the five and she shrugged and said fine, then went to the table. After a little while she came and said that she was done and I then asked if the candy had been thrown. She said no. I said to her that we also need to throw the candy every night as well. I asked her if she could go back and throw the candy, she stood paused for a second and then said okay I will. She still stood there I said that if she would go start that now it would be great. She laughed and said okay I will. She then said there is something she has to do first and I asked what that was. She said I have to go pee, do I need permission to do that. I chuckled a bit and jokingly said of course you have permission to do that. So finally she went back to the five and was talking to another female employee and 10 minutes later she came back and said that she was done and then I asked if all the candy had been thrown and she said no. I asked why. She said that the person that comes in, in the morning that works the candy table, told her not to throw it and he would take care of it. So, I went over and asked him if what she said was true. Forrest is the morning person's name, and he said yes its true, and he will take the candy to the deal wall to put on display. Standing at the end of the table was Jennice and said "yes" and laughed and started walking off and I then told her to go ahead and start facing them.

After work Jennice met me at my truck and asked me why I was being such an asshole earlier. I said I wasn't being an asshole and I just asked you to do something and you gave me some attitude about it. She said that I was being a asshole to her. This is not the first time I have been talked to this way by her. I told her that I am not disputing up with her attitude and that she can not come into work the next night and that I was going to talk to upper management about the issue and let her know if she can come back to work or not. She then said "what do you want me to do, press my lips on your ass". I said no, Jennice I want you to talk to me like a decent human being. She said "well your acting like dick though". Then I said that the conversation is over and I would not like her to come back to work cause I am going to talk to the upper management about this. She then said "well I am going to come in anyway and work until blame talks to me. I then told her if she comes in I will fill the incident form out and then she will be working for free and that's fine with me. Then I got in my truck and drove off until I got a block away from Macey's and then came back to talk to Randy and Ken about it, so that they were aware of the issue.

CLAIMANT Well, it's almost correct. I actually did start three days earlier than that, but it's about right.

JUDGE Okay.

CLAIMANT That's why –

JUDGE So February –

CLAIMANT It's more like the 20 –

JUDGE - 22nd? What day did you start?

CLAIMANT Okay. It was the 20th.

JUDGE Okay. And then your last day worked was 1/8/09?

CLAIMANT It was.

JUDGE What was your job title?

CLAIMANT I was part of the freight crew.

JUDGE Okay. And what happened then on your last day that caused your employment to end?

5
7 CLAIMANT I – after my shift had ended, I thought I was being treated unfairly, and I went to
3 talk to my boss outside, which I had done before. And was trying to talk how I
9 felt out, because I felt I was being treated unfairly, and I think they should be able
1 to talk things out. And like the conversation, he just started getting mad, and then
2 out of the blue he fired me.

3 JUDGE What did he say?

4
5 CLAIMANT He just – he said, I don't want to talk about this right now. And I said, well, it
6 needs to be solved. I said, I can't work like this. And he said – he paused for a
7 second and he said, you're done. And I said, what do you mean you're done?
8 And he said, you're out of here. You're fired.

9
0 I said – I said, you're firing me? I said, you can't do that. And he said, I don't
1 have to deal with this. And he turned around and got in his truck and left. He
2 just left me standing there.

3
4 JUDGE Okay. And what –

- CLAIMANT Just like –
- JUDGE - was it that – why did you believe you were being treated unfairly?
- CLAIMANT During my shift – I get paid the same as everyone else, and I would do three times as much work. And he was really rude about – I mean, everybody he treats there with respect. He would tell them to go do something really nicely, but to me, he points out me, do that, do this, do that, and he just being really rude to me. He was treating me like his slave.
- JUDGE By tell you – by giving you orders?
- CLAIMANT No, no, no, it was the way in which he presented it to me. He was very rude.
- JUDGE Okay. And so did you speak with anyone else, like go up the chain?
- CLAIMANT No, I didn't. I – I – no, he's my boss. I've never had to – it wasn't really that big of a deal. I mean, that's the shocking thing. It really – it wasn't a big deal. And I don't even know how he got so mad at me.
- JUDGE Okay. And specifically he said you're fired?
- CLAIMANT Yes, he did. He probably – you know, I – he probably said it about two or three times actually, I mean.
- JUDGE Okay. And –
- CLAIMANT Go back to work and I wasn't getting paid. I mean, I – he actually did say the words you're fired, though.
- JUDGE And so did you make any effort then to retain your employment and talk to –
- CLAIMANT I actually – I actually did for probably the next few minutes after I – he could tell that my face was pretty distraught. And I just sat there, and I kept asking him, I said, why are you firing? I said, this isn't – this isn't a big deal. What's wrong? And he just – he wouldn't answer me. He just kept saying, I don't have to deal with you.
- JUDGE Have you had any prior warnings or discipline?
- CLAIMANT I was a very good worker. I have never had any written discipline.
- JUDGE Okay.

JUDGE Uh-huh.

SWARTZ And so – and then she was down at the end of the aisle and she looked at me and said, see, and laughed and then walked off. And I said, okay, why don't we – let's start basing. Basing is when we take the product on the shelves and pull forward to the front and make everything look good for the day.

JUDGE Okay.

SWARTZ And then after work I sent everyone home. She met me out at my truck and came up to me and asked me why I was being such an "asshole". I said, how was I being and asshole? And she says, well, if you don't know, then I guess it's no point in talking to you.

And I was like, well, frankly I'm tired of putting up with your attitude, Jennica, and I would like you to go home and I'll talk to upper management about this issue and then we'll – they'll contact you and let you know when you can come back to work. And –

JUDGE Yeah.

SWARTZ - then she got – she got very angry and she said I was acting like a "dick" and that – the question came up, she said, what would like me to do, press my lips on your ass? And I said, no, Jennica. I just want you to talk to me like a descent human being. And then I said, okay, well, this discussion is over with.

I'm going to talk to the upper management about the issue, and they will contact you and let you know when you can come back to work. And then after that, that's when I got in my truck and left.

JUDGE Uh-huh. And so then did you report the Claimant's – what had happened?

SWARTZ Yes. I reported to my manager that morning.

JUDGE Uh-huh. And what happened?

SWARTZ And they –

JUDGE And would that be then Mr. Butterworth?

SWARTZ Yes. And that – my managers - Ron and Randy that were there – they were the only managers that were there that morning.

JUDGE Uh-huh.

me and left me a message? Because –

JUDGE He's going to testify next, so why don't you ask him?

CLAIMANT Well, why – John, why did you fire me if you can't?

SWARTZ I didn't fire you. I just told you that you needed to go home and that upper management would you contact you.

CLAIMANT You didn't say that if I came back I'd be working for free?

SWARTZ That's after you said – the fact that you said you were going to come in anyway –

CLAIMANT (Inaudible) so you fired me?

JUDGE Ms. Caldwell?

CLAIMANT Yes.

JUDGE Do not interrupt him. You need to allow him to finish his answer.

CLAIMANT Sorry. I apologize.

JUDGE Okay. Go ahead. Can you say that again, Mr. Swartz?

SWARTZ Yes. I – after – when she said that before.

8 JUDGE When she said what?

9

0 SWARTZ That she said that she was going to come back in anyway. And I told her that –

1 from that point I said, well, you can come in, but you'll be working for free

12 because upper management needs to speak to you about this issue.

13

14 CLAIMANT That's not true. I was fired. There's no message on my phone. I –

15

16 JUDGE Ma'am, you're going to have your opportunity to make a final statement, and you

17 kind of need to hold those for that.

18

19 CLAIMANT Okay.

20

21 JUDGE This is the point of the hearing for you to question Mr. Swartz, and so I can't have

22 you making comments yet. You need to hold off until your final statement, and

23 then you can make – you may want to jot them down so you remember. But I

24 can't have you making comments when it's time to question.

CLAIMANT	Okay.
JUDGE	Okay. Do you have any other questions for Mr. Swartz?
CLAIMANT	Just how come he didn't – how come you didn't tell Mr. Butterworth about it?
SWARTZ	Because he was not there the morning of. I told Ron and Randy about the issue.
CLAIMANT	All right.
JUDGE	Thank you, Mr. Swartz. Mr. Butterworth, can you hear me?
BUTTERWORTH	Yes.
JUDGE	Okay. So tell me, is it – who are Ron and Randy?
BUTTERWORTH	Ron and Randy are part of our grocery department, Your Honor. They would be the supervisors that Brad would see most often –
JUDGE	Okay.
BUTTERWORTH	- as they come in early in the morning.
JUDGE	They would be – who's Brad?
BUTTERWORTH	I'm sorry, they would be John's closest supervisor –
JUDGE	Okay.
BUTTERWORTH	- excuse me.
JUDGE	Well, so they spoke with you, correct?
BUTTERWORTH	No. Actually how I found out it, Your Honor, is when I came in that morning- the following morning, I read John's statement that he had, and that's how I became aware of the situation.
JUDGE	So then what did you do?
BUTTERWORTH	At that point I tried to make contact with Jennica, and was unable to.
JUDGE	Well, what does that mean? How did you try and –
BUTTERWORTH	I tried to call her on her phone.

JUDGE What number did you call?

BUTTERWORTH I believe I used the number that's on our list, which is the number that's listed in the documents.

JUDGE Which is?

BUTTERWORTH Hang on just a second.

JUDGE Okay.

BUTTERWORTH I think it's 760-6453.

JUDGE Okay. And so was there no answer, an answering machine, ring and ring, what?

BUTTERWORTH There was never no answer. And probably the four or five times that I called over a period of probably a week to ten days, I do recall leaving at least one message.

JUDGE Okay. And anything – did you ever see or speak to the Claimant?

BUTTERWORTH No.

JUDGE Okay. Would the Claimant know that Mr. Swartz didn't have the authority to fire her?

BUTTERWORTH It would not be something that would be typically talked with, with each individual team member.

JUDGE Yeah. So by virtue of (inaudible) her supervisor, the Claimant then could reasonably think he had that authority?

BUTTERWORTH I'm sorry?

JUDGE Could the Claimant reasonably think that Mr. Swartz had the authority to discharge her?

BUTTERWORTH I guess that's possible.

JUDGE Okay. All right. Anything else you want me to know, Mr. Butterworth?

BUTTERWORTH Just that as the store leader, I make every attempt in these situations, Your Honor, to contact the parties. My attempt was to try and get John and her together to discuss the situation. Using – as I read the documentation, this would not be an

CLAIMANT I got along with him and everybody else.

JUDGE Okay. Does the Employer have like a grievance process?

CLAIMANT I'm not sure. I had my handbook. I went to retain it yesterday, but they would not give it to me. They said they were under no obligation. But I – I'm sure that they do. I know that they do have procedure, and it wasn't followed. But I, myself, don't have that.

JUDGE And so if they had a process like that, why didn't you avail yourself of it? Like

CLAIMANT Well –

JUDGE - take it –

CLAIMANT - he fired me. And he fired in such a cruel way. I was humiliated and embarrassed.

JUDGE Okay. Why – who – what was cruel and humiliating?

CLAIMANT The way he talked to me.

JUDGE Okay.

CLAIMANT He sent me away like a dog. He said go. And then when I tried to talk it out and ask him explain why was you so mad; why are you mistreating me like this, he wouldn't give – he turned his back on me and he just left.

JUDGE Okay. So what –

CLAIMANT He –

JUDGE What?

CLAIMANT He hurt my feelings.

JUDGE Okay. So what efforts have you made to find work?

CLAIMANT I've been out applying for jobs every chance that I can get, every day. I look through the paper. I go – I've been into almost every business in town.

JUDGE Okay. So what – how many jobs have you applied for?

CLAIMANT I probably – realistically, I probably applied for at least 40; I'm just thinking. I

haven't kept a list of every single one of them. And I don't always have Internet access, but I also go online and sign up for –

JUDGE Have you had any – has anything happened with these applications; any interviews or calls?

CLAIMANT Not a thing.

JUDGE Okay. Anything –

CLAIMANT I've got a couple of dates down that they said to come back, but those aren't until May. So I'm just going to – I just keep calling these jobs and – but nobody's leaving their jobs now -

JUDGE Uh-huh.

7 CLAIMANT - and I'm hoping that maybe with school coming out come June. I just kept
3 calling and checking -

9
0 JUDGE Okay.

1
2 CLAIMANT - nothing.

3
4 JUDGE All right. Anything else you want me to know, Ms. Caldwell, about the job
5 separation?

6
7 CLAIMANT Well, I just – you – well, there's a couple of things. They put in here that I
8 actually was discharged, so I didn't voluntarily quit. He told me to leave and not
9 come back. And they said the reason that they discharged me was
10 insubordination, which the definition of that is disobedience.

11
12
13 And I did everything that my job – he might – you know, we might have had
14 problems during that shift, but I've done everything I've ever been told, and I
15 done it very good and I done it prompt. I – like I said, I've never been written up.
16 Everyone there knows me. I'm a good worker.

17
18
19 And this is embarrassing. I have not been able to go back into Macey's for
20 shopping. I've ran into several of the employees, and I can't talk to them because
21 I can't tell them why I was fired -

22
23
24 JUDGE Okay.

25
26
27 CLAIMANT - because I don't know.

28

JUDGE Exhibit –

CLARK 9. But in that statement, which obviously is difficult to read; it's a very bad copy, it says something to the effect I – after work Jennica met me at my truck and asked me why I was being such an "asshole" earlier.

JUDGE Is that true?

CLARK Is that what you said?

CLAIMANT Excuse me?

CLARK Is that what you said to him; you asked him why he was being such an "asshole"?

CLAIMANT No. I absolutely don't recall that.

CLARK And at some point in here it also says what do you want me to do, press my lips on your "ass"? Did you say that?

CLAIMANT No.

CLARK So he's making this up, right?

CLAIMANT I absolutely – yeah. I mean, there's other things that have been –

CLARK And also he says here, and this is about the fourth line from the bottom –

CLAIMANT Yeah.

CLARK - it says, well, I'm going to come in anyway and work until Blain talks to me. Did you say that?

CLAIMANT I didn't – no, I didn't. I didn't say that. When was this written, the date?

CLARK Apparently on January 8th it looks like, if you look at the top.

CLAIMANT Well, that – I don't –

CLARK Any –

CLAIMANT - I do not recall any of that. I can't even imagine that.

CLARK So the conversation was – didn't use any of that kind of language, correct?

CLAIMANT No. But it wouldn't matter anyway because we have talked like that to each other before.

CLARK When you –

CLAIMANT It says –

CLARK Like what - you talked like what before; using that -

CLAIMANT We have –

CLARK - kind of language?

CLAIMANT What?

CLARK You say you talked like that before; what does that mean?

CLAIMANT We've used – you know, we've joked with each other before using language. I didn't talk to him like that.

CLARK When you –

CLAIMANT If I did, it wouldn't matter because he – like I said, he talks to me like that all the time. And in a discharge case, if you look under 202, it says that knowledge – the employee must have had knowledge of the conduct, which the Employer expected.

JUDGE Well, stop. Ma'am, I'm well aware of the rules. But I have a question; you said it wouldn't matter because you talked like that before. Specifically do you – can you recall things that were said that –

CLAIMANT I absolutely do not. I don't remember –

JUDGE Thank you.

CLAIMANT - any cuss words or any names like that. I – and – and we weren't even in a heated discussion actually. It was just a discussion until he started getting mad. And then I didn't get mad until he fired me for no reason, so.

CLARK When you – when you gave your testimony earlier, you said you were told you're fired, and your reply was, you can't do that.

CLAIMANT I did –

1 CLARK Did you say that?
2
3 CLAIMANT I did say that. I did – because he fired me for no reason. And then when I asked
4 him –
5
6 CLARK Now is that what – let me ask a follow-up question. If you said you can't do that,
7 is that because you didn't believe that he had the authority to discharge you?
8
9 CLAIMANT What?
0
1 CLARK Did you believe that Mr. Swartz had the authority to discharge you?
2
3 CLAIMANT Absolutely. I know he did. He's my boss.
4
5 CLARK And yet you said you were going to continue working until you talked to Blain?
6
7 CLAIMANT Well, I absolutely did not say that. That doesn't even make sense, and it doesn't
8 make sense for someone to be fired and told to come back to discuss it either.
9
0 JUDGE So you were told to come back and discuss it?
1
2 CLAIMANT No, but he writes that in there that –
3
4 JUDGE Okay. I see.
5
6 CLAIMANT - that he said that to me, and that's not true either.
7
8 CLARK Thank you, Your Honor. I don't have further questions of the Claimant at this
9 point.
0
1 JUDGE Okay. We'll move on. Mr. Swartz?
2
3 SWARTZ Yes.
4
5 JUDGE Were those dates of employment correct, February 20th, '08, to January 8th, '09?
6
7 SWARTZ I believe so, yes.
8
9 JUDGE Okay. And what was the Claimant's job title?
0
1 SWARTZ She was part of the freight crew.
2
3 JUDGE Okay. And what caused the Claimant's employment to end? Tell me what
4 happened.