

2010

# Jeffrey S Record, Emilie A. Tanner v. Workforce Appeals Board : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](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.

Suzan Pixton; Utah Department of Workforce Services; Attorneys for Respondents.

April L. Hollingsworth; Attorney for Petitioners.

---

## Recommended Citation

Brief of Respondent, *Record v. Workforce Appeals Board*, No. 20100719 (Utah Court of Appeals, 2010).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/2485](https://digitalcommons.law.byu.edu/byu_ca3/2485)

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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

JEFFREY S. RECORD,  
EMILIE A. TANNER,

Petitioners,

v

WORKFORCE APPEALS BOARD,  
UTAH DEPARTMENT OF  
WORKFORCE SERVICES, and  
ZIONS FIRST NATIONAL BANK,

Respondents.

Case No. 20100719-CA  
Case No. 20100755-CA

Priority No. 7

---

COMBINED  
BRIEF OF RESPONDENT

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

---

APRIL L. HOLLINGSWORTH  
HOLLINGSWORTH LAW OFFICE  
1115 SOUTH 900 EAST  
SALT LAKE CITY UT 84105

Attorney for Petitioners  
Jeffrey S. Record  
Emilie A. Tanner

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**  
**FEB 07 2011**

# IN THE UTAH COURT OF APPEALS

---

JEFFREY S. RECORD,  
EMILIE A. TANNER,

Petitioners,

v.

WORKFORCE APPEALS BOARD,  
UTAH DEPARTMENT OF  
WORKFORCE SERVICES, and  
ZIONS FIRST NATIONAL BANK,

Respondents.

---

:

:

:

:

:

:

:

**Case No. 20100719-CA**  
**Case No. 20100755-CA**

Priority No. 7

## COMBINED BRIEF OF RESPONDENT

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

---

APRIL L. HOLLINGSWORTH  
HOLLINGSWORTH LAW OFFICE  
1115 SOUTH 900 EAST  
SALT LAKE CITY UT 84105

Attorney for Petitioners  
Jeffrey S. Record  
Emilie A. Tanner

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/STANDARD OF REVIEW .....	1
STATUTES AND REGULATORY PROVISIONS AT ISSUE .....	2
STATEMENT OF THE CASE .....	2
A.    Nature of the Case, Course of Proceedings, and Disposition Below .....	2
B.    Statement of the Facts .....	3
SUMMARY OF ARGUMENTS .....	7
POINT I .....	8
THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE BOARD'S DECISIONS.	
POINT II .....	11
THE EMPLOYER HAD JUST CAUSE TO DISCHARGE THE CLAIMANTS.	
POINT III .....	13
THE BOARD CORRECTLY REFUSED TO ADMIT THE CLAIMANTS' NEW EVIDENCE ON APPEAL.	
POINT IV .....	18
THE BOARD CORRECTLY FOUND THE NEW EVIDENCE, IF ADMITTED, WOULD NOT HAVE CHANGED THE OUTCOME OF THE DECISIONS.	



POINT V .....	21
---------------	----

THE BOARD CORRECTLY AFFIRMED THE ALJ'S  
DECISION TO EXCLUDE AN EXTRANEOUS WITNESS.

POINT VI .....	22
----------------	----

THE CLAIMANTS FAILED TO MARSHAL THE  
EVIDENCE IN SUPPORT OF THEIR APPEAL.

CONCLUSION .....	26
------------------	----

ADDENDUM A - Determinative Statutes and Rules

ADDENDUM B - Decisions of the Department Representative

ADDENDUM C - Decisions of the Administrative Law Judge

ADDENDUM D - Decisions of the Workforce Appeals Board

ADDENDUM E - References to the Record

## TABLE OF AUTHORITIES

### CASES CITED

<i>Albertsons, Inc. v. Department of Employment Sec.,</i> 854 P.2d 570, 574 (Utah App. 2007) .....	20
---	----

<i>Autoliv ASP, Inc. v. Department of Workforce Servs.,</i> 2001 UT App 198, &16 .....	2
---	---

<i>Bhatia v. Department of Employment Sec.,</i> 834 P.2d 574, 577 (Utah App. 1992) .....	11
---	----

<i>Crockett v. Crockett</i> , 836 P.2d 818 (Utah Ct. App. 1992) .....	23
---	----

<i>Eagala, Inc. v. Department of Workforce Services,</i> 157 P.3d 334, 339 (Utah App. 2007) .....	20
<i>Grace Drilling Company v. Board of Review,</i> 776 P.2d 63 (Utah Ct. App. 1989) .....	8,10,17,18,23,24
<i>Johnson v. Department of Employment Sec.,</i> 782 P.2d 965, 968 (Utah Ct. App. 1989) .....	1,2
<i>Madson v. Department of Workforce Services,</i> 2010 UT App 286 (Utah App. 2010) .....	13
<i>Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.,</i> 872 P.2d 1051 (Utah Ct. App. 1994) .....	23
<i>Salt Lake City Corp. v. Department of Emp. Sec.,</i> 657 P.2d 1312, 1312 (Utah, 1982) .....	9
<i>Target Interact US, LLC v. Workforce Appeals Bd.,</i> 2010 UT App 255 .....	25
<i>V-1 Oil Co. v. Department of Env'tl. Quality,</i> 904 P.2d 214 (Utah Ct App. 1995) .....	9
<i>West Valley City v. Majestic Inv. Co.,</i> 818 P.2d 1311, 1315 (Utah App. 1991) .....	24

## STATUTES

§35A-4-508(8), Utah Code Annotated .....	1,2
§63G-4-403, Utah Code Annotated .....	1,2
§78A-4-103, Utah Code Annotated .....	1,2
R994-405-202, Utah Administrative Code .....	2,11
R994-508-305(2), Utah Administrative Code .....	2,13

## **JURISDICTION OF THE COURT OF APPEALS**

This Court has jurisdiction of these Petitions for Review pursuant to Article 8, §3 of the Utah Constitution; Utah Code Ann., §§35A-4-508(8)(a), 78A-4-103, 63G-4-403; and Rule 14 of the Rules of Appellate Procedure.

## **ISSUES PRESENTED FOR REVIEW**

Was the Workforce Appeals Board's decision to deny unemployment insurance benefits to the Claimants reasonable, rational, and supported by substantial evidence?

Did the Workforce Appeals Board err in finding the Claimants were discharged with just cause?

Did the Workforce Appeals Board err in not considering photographic evidence discovered and submitted after the hearings before the Administrative Law Judges?

Did the Workforce Appeals Board err in excluding testimony from Claimant Record's additional witness?

## **STANDARD OF REVIEW**

The question of whether the Employer had just cause to terminate the Claimants is a mixed question of law and fact under the Utah Administrative Procedures Act. *Johnson v. Department of Employment Sec.*, 782 P.2d 965, 968 (Utah Ct. App. 1989). "When we review an agency's application of the law to a particular set of facts, we give a

degree of deference to the agency." *Autoliv ASP, Inc. v. Department of Workforce Servs.*, 2001 UT App 198, ¶16 (quotations and citations omitted). "Accordingly, we will not disturb the Board's application of law to its factual findings unless its determination exceeds the bounds of reasonableness and rationality." *Johnson*, 782 P.2d at 968.

### **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-4-508(8), Utah Code Annotated  
§63G-4-403, Utah Code Annotated  
§78A-4-103, Utah Code Annotated  
R994-405-202, Utah Administrative Code  
R994-405-305(2), Utah Administrative Code

### **STATEMENT OF THE CASE**

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

This is an appeal from two unemployment compensation decisions by the Workforce Appeals Board ("Board") of the Utah Department of Workforce Services ("Department"). The Petitioners/Claimants were discharged from their employment for involvement in the same incident. The facts in both cases are identical and each

Petitioner testified at the hearing of the other. In addition, both Claimants are represented by the same attorney. This court consolidated the two cases at the request of the parties.

The Claimants, Ms. Tanner and Mr. Record, filed claims for unemployment insurance benefits after being terminated from employment with the Employer. Decisions were issued by Department representatives denying unemployment insurance benefits, finding the Claimants were discharged for just cause.

Each Claimant separately appealed the Department's decision to Administrative Law Judges ("ALJ") who, after holding an evidentiary hearing for each Claimant, upheld the Department decisions. The Claimants appealed separately to the Workforce Appeals Board. The Board unanimously upheld the decisions of the ALJs for each Claimant. The Claimants then each filed a Petition for Review seeking reversal of the Board's decisions. On stipulated motion of counsel, this court ordered the cases be consolidated. Therefore, this responsive brief will address the Petitions of both Claimants.

**B. Statement of the Facts.**

The Board supplements and corrects the Claimants' Statements of the Facts as follows:

Mr. Record worked for the Employer as a leading information system administrator for 14 years. (Record, R. 029: 32-40). Mr. Record's employment was terminated on February 22, 2010. (Record, R. 031:34-41).

Ms. Tanner worked for the Employer for 17 years, most recently as a leading supervisor. (Tanner, R. 088: 1-3). Ms. Tanner was terminated from her job on February 22, 2010. (Tanner, R. 088: 13-14).

On February 19, 2010, the Claimants met each other in an unused file room at work during working hours. (Record, R. 071: 1-8; Tanner, R. 090:37-44; 091: 1-7). The room contained empty shelves and was, for the most part, a large unused room. (Record, R. 19; 035: 34-35; 045: 38-41; 044: 28-31). The door to the room remained open while the Claimants were inside; however, the room was very dark with only a dim security light at the entrance. (Record, R. 035: 41-44; 036: 1-2; 044: 28-31; 048: 34-36). A co-worker entered the room to blow her nose. (Record, R. 044: 13-15). When she entered she heard a noise in the room and turned on the lights to see what was making the noise. (Record, R. 044: 15). The co-worker witnessed Ms. Tanner sitting on Mr. Record's lap. (Record, R. 044: 33-36). She testified she then saw the Claimants jump up and pull their pants up. (Record, R. 044: 15-16, 36-37, Tanner, R. 078: 9-10). The co-worker then left the room but stood outside in a hallway waiting for the Claimants to exit so she could accurately identify them. (Record, R. 044: 16-22).

The co-worker reported the incident to her manager. (Record, R. 045: 9-16). The manager then informed the executive vice president, Mr. Hinds, who in turn informed the human resources department. (Record, R. 030: 31-36). Mr. Hinds questioned the Claimants regarding the incident. (Record, R. 054: 40-44; 055: 1-2; 055: 37-39). The Claimants both admitted to being in the file room together on that day. (Record, R. 055:

17-22; 056: 1-3). Ms. Tanner admitted to her supervisor that her behavior was inappropriate. (Record, R. 056: 3). Later, during the hearing with the ALJ, Ms. Tanner denied having admitted the behavior was inappropriate. (Tanner, R. 112: 16). When asked during the hearing if he thought "it could look bad, or inappropriate, to be in a darker room . . . alone with Ms. Tanner," Mr. Record testified "it obviously didn't enter my thinking when we agreed to meet there," (Record, R. 075: 7-13).

The Claimants had been given several warnings their behavior towards each other was inappropriate. The first warning was issued in September 2009. (Record, R. 032: 18-21; Tanner R. 011, 051: 4-7). The Employer received complaints from employees and managers the Claimants spent too much time together behind closed doors and acted inappropriately toward each other while at work. (Tanner, R. 050: 31-44; 050: 7-44, 045: 19-44; 046: 1-26; 047: 19-30; 090 23-35; Record, R. 032: 25-44; 033: 1-3, 17-22, 29-44; 034: 3-21; 075: 24-37). The Claimants were instructed to "manage the perception" of their relationship while at work and ensure their behavior did not create an uncomfortable working environment for others. (Record, R. 034: 30-37; Tanner R. 051: 9-15).

The Claimants were issued a second formal warning in November 2009, when the objectionable conduct continued. (Tanner, R. 010; 046: 30-32; Record, 010; 033: 17-25) The warning was based on complaints the Claimants "continue to meet behind closed doors" and Mr. Record had "been seen on his cell phone excessively which [the supervisor] determines as personal calls." The warning continued: "We continue to

believe that both employees have not made necessary changes in their working relationship and appear to dismiss our directive." (Tanner, R. 010, Record, R, 010).

Mr. Record alleges he did nothing inappropriate by meeting in the empty dark file room. (Record, R. 070: 38-40). Both Claimants allege they discussed work while in the room and did nothing else. (Record, R. 073: 36-42; Tanner, R. 090: 37-44; 091: 1-7). Mr. Record testified they used the dark unused file room to hide their meeting in an effort to manage the perception of their relationship as instructed by their superiors. (Record, R. 073: 1-2). Ms. Tanner claims they used the file room because she was meditating there while on break and Mr. Record interrupted her to discuss business matters. (Tanner, R. 090: 37-44; 091: 1-19).

The Claimants acquired photographic evidence of the file room in question. (Record, R. 154; 158; 132-134; Tanner, R. 135). The Claimants presented this as new evidence to the Board on appeal from the ALJs' decisions.

The Claimants asked the Board to consider and admit this new evidence on appeal. (Record, R. 107-127; Tanner, R. 127-131). The Board refused to accept or consider the evidence. (Record, R. 144-145). The Claimants assert the photographs show there is a lack of visibility in the file room. (Tanner, R. 128-129; Record, R. 132). The Claimants allege this lack of visibility made it impossible for the witness to clearly see if the Claimants were undressed in the file room. (Tanner, R. 128-129; Record, R. 132).



## **SUMMARY OF ARGUMENTS**

The Board correctly determined the Employer had just cause to discharge the Claimants based on substantial evidence in the record. Because the Employer had just cause to discharge the Claimants, the Claimants are ineligible for benefits. The Board's decisions to deny benefits were reasonable and rational and supported by substantial evidence in the record. The Petitions for Review should be denied.

In their Petitions for Review, the Claimants rely on the photographic evidence submitted after the hearings before the ALJs. The Claimants believe the photographic evidence is sufficient to warrant a reversal of the Board's decisions. This evidence was available and accessible prior to the ALJ hearings, and as such, the Claimants had a responsibility to present the evidence at that time. The Claimants failed to present this evidence at the hearing and it was therefore not admitted on appeal to the Board. New evidence is only admitted on appeal if the circumstances surrounding the evidence are unusual or extraordinary and the evidence was not reasonably available and accessible at the time of the hearing. The Claimants offered no compelling arguments to show their circumstances were unusual or extraordinary. The evidence was available and accessible at the time of the hearing.

Mr. Record sought to call an additional witness during his hearing before the ALJ. He made a proffer of the testimony of his witness and the ALJ ruled the testimony would

not be relevant or have any probative value. Mr. Record has not shown the testimony of the witness was relevant to the issue of just cause.

The Claimants failed to marshal the evidence to show the Board's decision is not supported by substantial evidence.

## **ARGUMENT**

### **POINT I**

#### **THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE BOARD'S DECISIONS.**

Two different ALJs heard the evidence presented by the Claimants and found the Employer sustained its burden of proof in showing just cause for the discharges. Those findings are based on competent and substantial evidence in the records, including the testimony of the Claimants and the Employer's witnesses.

This court defined "substantial evidence" in *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989) holding that:

[u]nder the UAPA, it is clear that the Board's findings of fact will be affirmed only if they are "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. §64-46b-16(4)(g) (1988). . . .

Substantial evidence is "more than a mere 'scintilla' of evidence . . . though 'something less than the weight of the evidence.'" "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" . . .

In applying the "substantial evidence test," we review the "whole record" before the court, and this review is distinguishable "from both a de novo review and the 'any competent evidence' standard of review." . . . It is also important to note 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 supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. *Id.* at 67, 68. [citations omitted]

In *V-1 Oil Co. v. Department of Envtl. Quality*, 904 P.2d 214 (Utah Ct App. 1995),

this court held an appellate court

will not substitute its judgment as between two reasonably conflicting views, even though [it] may have come to a different conclusion had the case come before [it] for de novo review. *Id.* at 216.

In *V-1 Oil Co. v. Division of Envtl. Response & Remediation*, 962 P.2d 93 (Utah

Ct. App. 1998), the court held:

It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences. *Id.* at 95.

The trier of fact is the appropriate entity to make determinations regarding credibility and 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, 1312 (Utah, 1982). The correct issue before the court is whether the ALJs' findings, as adopted by the Board, are supported by substantial evidence in the record

As this court held in *Grace supra*:

We defer to the Board's assessment of conflicting evidence. We are in no position to second guess the detailed findings of the ALJ which were adopted by the Board. It is not our role to judge the relative credibility of witnesses. "In undertaking such a review, this court will not substitute its judgement as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review. (Citation omitted). "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences be drawn from the same evidence, it is for the Board to draw the inferences. (Citations omitted). *Albertsons, Inc. v. Department of Employment Sec.*, 854 P.2d 570, 575 (Utah Ct. App. 1993).

The finders of fact in this case were the ALJs, who had the opportunity to participate in the hearings and question the claimants and the Employer's witnesses. The ALJs found the Employer's witnesses more credible than the Claimants. There is substantial evidence in the record to support the ALJs' credibility determination and it should not be disturbed. The Employer offered credible testimony from a co-worker who witnessed the Claimants in the file room in a state of undress. Both ALJs found the co-worker's testimony to be credible when weighed against the self-serving testimony of the Claimants. Even if, as the Claimants allege, the co-worker could not see who was in the file room or their state of dress, the Claimants admit they were in a dimly lit file room, "hidden" behind several shelving units, after having been told not to have any non work related contact with each other at the work place. So, even if the co-worker had not been found credible, the Claimants conduct was sufficient to support a finding of just cause under these circumstances.

## POINT II

### **THE EMPLOYER HAD JUST CAUSE TO DISCHARGE THE CLAIMANTS.**

A Claimant is not eligible for unemployment benefits if discharged for just cause as defined in Utah Admin. Code R994-405-202. In establishing whether a Claimant was discharged for just cause, the employer has the burden of proving: (1) the Claimant's culpability, (2) his or her knowledge of expected conduct, and (3) that the offending conduct was within the claimant's control. See *Bhatia v. Department of Employment Sec.*, 834 P.2d 574, 577 (Utah App. 1992). The employer must establish each of the three elements in order for the Board to deny benefits. *Id.* at 577. The Employer here successfully proved all three elements.

#### **A. The Employer proved the element of culpability.**

In order to demonstrate the element of culpability, the Employer must show the conduct causing the discharge is so serious continuing the employment relationship would jeopardize the Employer's rightful interests. Utah Admin. Code R994-405-202(1). Here, the Employer proved its rightful interests were jeopardized by the Claimants' inappropriate behavior. The Employer received multiple complaints from other employees regarding the Claimants' behavior. Their behavior was obviously objectionable to those who made complaints. The Claimants met in a dark, unused file room alone during work hours. The Claimants were partially undressed. The Claimants disregarded the Employer's previous counsel to keep a professional relationship with each

other and to manage the perception that others may have of their relationship. The Employer's rightful interests were jeopardized by this inappropriate behavior.

Other employees complained of the perceived relationship between the Claimants. An employer has the right to regulate activities in the workplace and prohibit conduct that may be offensive to other employees or make other employees uncomfortable. The conduct was harmful enough to prove the culpability prong of the just cause test.

**B. The Employer proved the element of knowledge.**

In order to prove knowledge, the Employer must show the Claimants had knowledge of the conduct the Employer expected.

The Claimants were counseled in September 2009 to manage the perception others had of their relationship in order to avoid creating an uncomfortable work environment. The Claimants were further warned in November 2009 because the objectionable conduct had continued after the September warning. Both Claimants were told to refrain from personal interaction with each other during work time. The Claimants knew, or should have known, that being alone together in a dark unused file room during work hours in a state of partial undress was inappropriate behavior the Employer had previously counseled against. The knowledge prong was proved.

**C. The Employer proved the element of control.**

In order to prove the element of control, the Employer must show the conduct causing the discharge was within the Claimants' control.

The Claimants both had complete control over whether or not to meet in an unused, dimly lit file room during working hours. The Claimants could have chosen to follow the Employer's instructions to avoid inappropriate interaction with one another while at work. They were not forced to meet in the file room; they had other options. They could have discussed their business matters over the telephone or through email. They failed to do so. The control element was proved.

The Board reasonably and rationally found the Employer established all three elements for just cause. There is substantial evidence in the record to support the finding of just cause, the decision is entitled to deference, and should be upheld.

### **POINT III**

#### **THE BOARD CORRECTLY REFUSED TO ADMIT THE CLAIMANTS' NEW EVIDENCE ON APPEAL.**

The Board will not consider new evidence on appeal absent a showing of unusual or extraordinary circumstances, particularly if the evidence was reasonably available or accessible at the time of the hearing before the ALJ. *Madson v. Department of Workforce Services*, 2010 UT App 286 (Utah App. 2010) See also Utah Admin. Code R994-405-305(2).

The Claimants argue the circumstances in this case are unusual and therefore, new evidence should have been allowed on appeal. The Claimants allege the photographic evidence was not "available or accessible" before the ALJ hearing because the evidence

simply did not exist at that time. Further, they claim it was not reasonable to suggest the Claimants should have foreseen the need for photographic evidence because there was no way for the Claimants to know witnesses would testify concerning the visibility in the room. Lastly, they claim the Employer likely would not have allowed the Claimants access to the room to take pictures for the hearing.

The Claimants were each informed of the requirement to present all evidence at the hearings with the ALJs. Both of the Claimants received an appeals brochure that thoroughly explained the appeals process. (Record, R. 140). In the brochure, the Claimants were instructed to present all evidence at their hearing before the ALJ (Record, R. 140; Tanner, R. 143). They were informed further review and decisions on appeal would be limited solely to the evidence introduced at the hearing. (Record, R. 140; Tanner, R. 143) Thus, the Claimants knew or should have known they needed to present all relevant evidence at the hearings before the ALJs if they wanted the evidence to be admitted and considered on appeal.

The Claimants allege the photographic evidence was not "available or accessible" before the hearings because the photographs did not exist at that time. This argument is not compelling. It is the Claimants' responsibility to gather whatever relevant evidence they need and present that evidence to the ALJs. The appeals brochures that were sent to the Claimants plainly instructed them to "take time to prepare for your hearing. . . Obtain documents that help prove your facts and provide them to the ALJ and opposing party. . . Prepare all evidence." (Record, R. 140, Tanner, R. 143). The fact the photographs did



not exist prior to the hearing does not in turn make the evidence unavailable or inaccessible. The Claimants, in an effort to "prepare all evidence," could have reasonably taken the time to photograph the file room prior to the hearing. The burden of taking a photograph is relatively low. The ALJs, the Board, and the Employer should not have to incur additional expense in time and money to rehear a case in order to facilitate a Claimant's failure to timely obtain "available and accessible" evidence.

The Claimants argue they did not obtain the evidence before the hearing because they could not have foreseen the need for photographic evidence. They claim they didn't know witnesses would testify concerning the visibility in the room. This argument is unavailing. The Claimants were instructed to prepare all evidence that might be relevant to their case. The Claimants knew they were found alone together in a dimly lit unused file room by a co-worker. They admit they were in the room together and they knew they had been seen by the co-worker. Ms. Tanner admitted to having seen the co-worker and therefore knew where the co-worker was standing. The Claimants received copies of the Employer's exhibits at least one week prior to the hearing. The exhibits clearly show the Employer was relying on the statements of the co-worker and the Claimants should have realized this co-worker would testify about seeing them in the room. The Claimants could have reasonably foreseen testimony regarding the visibility of the room was likely. As such, the Claimants had sufficient notice they should submit timely evidence concerning the visibility in the room.

The Claimants argue they would not have been allowed access to the room to take the photograph since they were no longer employed at the location. The Claimants, however, did not present any evidence or even argue they tried to gain access to the room prior to the hearing or they were denied access by the Employer. Nor did the Claimants apply to the ALJs for assistance in obtaining the evidence. In fact, the Claimants did not mention anything during the hearings regarding possible photographic evidence of the file room. Contemplating an Employer may hinder a Claimant's access to evidence does not in fact make the denial of access true. If the Employer had in fact denied access to the Claimants then the Claimants might successfully argue their circumstances were unusual and they could not obtain the evidence before the hearing. In that situation, the Board would likely allow the new evidence on appeal, had the new evidence been relevant. The Employer here, however, did not in fact deny access to the Claimants. The Claimants did not even ask for admittance in the first place.

The Claimants should not be allowed more time to gain evidence because they failed to meet the requirements for the hearing. This practice would make the Department's requirement to present all relevant evidence at the hearing meaningless. Further, new evidence on appeal denies the Employer's witnesses the opportunity to evaluate the evidence and state whether the photographss accurately represent the room at the time of the incident. Lastly, the Claimants did not prove their circumstances were sufficiently unusual or extraordinary. The photographic evidence was reasonably available and accessible prior to the ALJ hearings.

In *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah, 1989) the claimant, Mr. Goodale, was discharged for allegedly testing positive for marijuana. Grace failed to provide the test results at the hearing before the ALJ providing only hearsay testimony about the test results. The ALJ told Grace the record would be kept open for a period of time to allow Grace to submit the test results. Grace later notified the ALJ it would not provide the test results due to confidentiality concerns. Grace did provide the test results to the Board of Review on appeal but the Board refused to consider the evidence or reopen the hearing. In upholding the Board's decision in that case, this court held:

. . . it is undisputed that Mr. Goodale was discharged solely because he tested positive for illegal drugs while on duty. It reasonably follows that the test results were crucial to Grace Drilling's burden of establishing that Mr. Goodale was discharged for "just cause." . . .

In short, the test results were clearly available at the time of the hearing and the Board so noted. The Board declined to consider the test results stating to do so would have deprived Mr. Goodale of the opportunity to rebut or cross-examine. We agree. Elementary fairness in unemployment compensation adjudications includes a party's right to see adverse evidence and be afforded an opportunity to rebut such evidence. Grace Drilling argues that Mr. Goodale could be given an opportunity to challenge the results if the matter were merely remanded to the appeal referee to take additional evidence. However, we do not believe granting parties "three bites at the apple" is consonant with efficient administrative procedure. Grace Drilling had ample opportunity to present its case and failed to meet its burden. We hold the Board did not abuse its discretion in refusing to consider the test results. [citations omitted]

In this case, it is undisputed the Claimants were discharged because they were seen together in the file room. As in *Grace*, it reasonably follows that evidence about the co-worker's ability to see the Claimants was critical to their case. The photographs could

have been taken prior to the hearing and made available at the time of the hearing. To admit the photographs at the Board level would deprive the Employer of the opportunity to rebut or cross-examine. "Elementary fairness in unemployment compensation adjudications includes a party's right to see adverse evidence and be afforded an opportunity to rebut such evidence." *Grace supra*. The Board properly refused to consider the Claimant's new evidence on appeal in this case as should this court.

#### **POINT IV**

#### **THE BOARD CORRECTLY FOUND THE NEW EVIDENCE, IF ADMITTED, WOULD NOT HAVE CHANGED THE OUTCOME OF THE DECISIONS.**

The Claimants argue the Board erred in finding the photographic evidence would not change the outcome of the case. The Claimants allege the photos are clear and strong enough evidence to warrant a reversal of the Board's decisions. They assert the photos prove the witness could not see the Claimants in the file room. The photos allegedly have Mr. Record sitting in the same place in the file room as he was on the day in question. (Record, R. 132). Mr. Record is not visible in the photos through the bookshelves. (Record, R. 133-134). The Claimants argue since he does not show up in the photos the co-worker clearly could not see the Claimants through the bookshelves.

The Board correctly found the photographic evidence, if admitted, would not have changed the outcome of the decision. The co-worker testified she could see the Claimants through the shelving. The ALJs and the Board both found the co-worker's testimony to be credible. Thus, even if the photos had been considered on appeal, the

Board still would have given more weight to the co-worker's credible testimony that she saw the Claimants partially unclothed in the unused file room. Further, the Claimant, Ms. Tanner, testified she could see the co-worker through the shelving. (Tanner, R. 097: 9-41). It is logical to assume if Ms. Tanner could see the co-worker through the shelving then the co-worker could see Ms. Tanner and Mr. Record as well.

The Claimants allege this logic is flawed. The Claimants suggest a person X can see through an opening such as a crack or a peephole to view an entire person Y on the other side, but that person Y cannot then see person X.

Here, however, we are not dealing with a peephole or a crack in which visibility is limited to a small opening from a larger object, like a door or a cave wall. The room in question is a large unused file room with empty shelves. The vantage point from one end of the room to the other is relatively the same as opposed to person X standing behind a door looking through a peephole at someone who is in a different room altogether.

In addition, the photograph captures a view of the room from one fixed point. A person who is trying to see through shelving to the other side of a room is not likely to keep his or her eyes and head at one fixed point. A person who is trying to look at something will likely duck the head slightly so as to obtain a better view. When the co-worker heard the noise in the file room, she flipped on the lights to see who was making the noise. (Record, R. 044: 13-23). It is highly probable when she flipped the lights on, she maneuvered her head to a point where she could see clearly through the shelves.

The Claimants also object to the credibility determination made by the ALJs and adopted by the Board. That credibility finding determined the co-worker's testimony was more credible than the testimony of the Claimants. Each party to a hearing comes forward with a different perception of the facts. It is the duty of the ALJ to determine which witness is more credible where divergent testimony is given. *Eagala, Inc. v. Department of Workforce Services*, 157 P.3d 334, 339 (Utah App. 2007). The ALJ is in the unique position of being an active participant in the hearing, interacting with the parties and also questioning the witnesses. *Albertsons, Inc. v. Department of Employment Sec.*, 854 P.2d 570, 574 (Utah App. 2007). In addition, the Board has the province to resolve conflicting evidence. *Eagala, Inc. v. Department of Workforce Services*, 157 P.3d 334, 339 (Utah App. 2007).

Here, the conflict between whether or not the co-worker could see through the shelves was resolved by the ALJs who reasonably concluded the co-worker's testimony was more credible than the testimony of the Claimants. Further, the Board adopted the ALJs' findings of fact in full. The Board has the province to draw inferences when inconsistent inferences can be drawn from the same evidence. *Id.* The Board inferred that the photographic evidence would not have discounted the co-worker's credible testimony. The co-worker testified she saw the Claimants partially undressed in a file room and the Board found that testimony to be credible. The Claimants have failed to show the Board's findings are not supported by substantial evidence.

Further, despite whether or not the Claimants were actually having a business discussion, and despite whether or not the pictures prove one could not see through the shelving, the fact remains the Claimants were found alone in a dimly lit, unused file room during working hours. The Claimants were previously counseled to avoid the appearance of inappropriate behavior and yet they chose to meet alone in a dimly lit, unused file room. Therefore, the Employer still satisfies the three elements of just cause even if the evidence is admitted and interpreted as the Claimants propose. The Employer has proven the Claimants had knowledge of what the Employer expected of them in connection with their relationship. The Employer has proven the behavior in question was within the Claimants' control. Further, the Employer has proven the element of culpability because their rightful interests were jeopardized by the Claimants' inappropriate behavior.

## **POINT V**

### **THE BOARD CORRECTLY AFFIRMED THE ALJ's DECISION TO EXCLUDE AN EXTRANEOUS WITNESS.**

The Claimant, Mr. Record, alone argues on appeal the Board erred in denying his witness a chance to testify. Mr. Record asked to call Mr. Ratliff as a witness because Mr. Ratliff was present during the discussions Mr. Record had with Mr. Hinds, the Executive Vice President of the Employer company. (Record, R. 082: 7-16). When, in the hearing, Mr. Record requested Mr. Ratliff's testimony, the ALJ had already heard testimony from Mr. Hinds concerning the conversation that took place in his office after the incident in the file room. Mr. Record told the ALJ Mr. Ratliff was going to testify

about the conversation in Mr. Hinds' office. (Record, R. 082: 7-21). The ALJ determined he did not need to hear additional testimony concerning the conversation in Mr. Hinds' office because it would not have any probative value.

What occurred in Mr. Hinds' office after the incident between the Claimants in the file room was not relevant to the resolution of the case. Neither Mr. Hinds nor Mr. Ratliff observed the behavior in the file room. The discharge was based on the conduct in the file room. (Tanner, R. 052: 3-5). The Claimant failed to show how Mr. Ratliff's testimony was relevant to the issue in this matter.

The Claimant argues Mr. Ratliff's testimony would contradict the testimony of Mr. Hinds; and therefore, would discredit Mr. Hinds. Whether or not the ALJ would have found Mr. Ratliff's testimony more credible than Mr. Hinds' is not the issue at hand. The ALJ was trying to determine if the Claimant was discharged for just cause. Mr. Record has not explained how the conversation that occurred after the incident is relevant to determining just cause for unemployment purposes. The ALJ properly excluded Mr. Ratliff as a witness because he was an extraneous witness with no additional probative evidence to add.

## **POINT VI**

### **THE CLAIMANTS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THEIR APPEAL.**

In finding the Claimants failed to sustain their burden of proving they were not terminated for just cause, the Board relied on the provisions of the Employment Security



Act, the Utah Rules of Evidence, and case law. In order to successfully challenge this finding, the Claimants "must demonstrate that the findings are not supported by substantial evidence when viewed in light of the whole record before the court." *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 67 (Utah Ct. App. 1989). The court should reject the Claimant's appeal for its failure to marshal the evidence in support of its conclusion that the findings were without foundation. The burden is an extremely heavy one and the Claimants have presented no evidence or arguments sufficient to overcome this burden.

In *Crockett v. Crockett*, 836 P.2d 818 (Utah Ct. App. 1992), this 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 Ct. 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 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 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 Claimants here have not met the marshaling burden. They have pointed to no evidence in the record to show 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 Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989), where this court held

. . . 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. *Id.* at 67-68.

In the recent unemployment case of *Target Interact US, LLC v. Workforce Appeals Bd.*, 2010 UT App 255 this court noted the employer failed to marshal the evidence on appeal stating:

we note that Target's briefing is deficient in several respects and that these defects alone would be grounds for this court to decline to disturb the Board's decision. Of particular concern is Target's failure to marshal the evidence in support of the Board's decision. See generally *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, P 17, 164 P.3d 384 & n.3, 2007 UT 42, 164 P.3d 384 ("To successfully challenge an agency's factual findings, the party must marshal [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." (alteration in original) (internal quotation marks omitted)). Target's central disagreement with the Board's decision is factual, and Target's failure to marshal the evidence in support of the Board's decision impermissibly shifts the burden of combing the record for supporting evidence onto this court.

In a separate concurring opinion in *Target*, Judge Voros wrote:

I concur in the result and in that portion of the memorandum decision concluding that Target's briefing does not satisfy the requirements of rule 24 of the Utah Rules of Appellate Procedure. While I agree that Target's claims of error lack merit, I would affirm on the ground that they are inadequately briefed.

The Claimants in this case also failed to meet their marshaling burden.

## CONCLUSION

The Claimants have raised no competent argument in support of their appeals. The decisions of the Board should be upheld.

Respectfully submitted this 7<sup>th</sup> day of February, 2011.

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

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 7<sup>th</sup> day of February, 2011:

APRIL L. HOLLINGSWORTH  
HOLLINGSWORTH LAW OFFICE  
1115 SOUTH 900 EAST  
SALT LAKE CITY UT 84105

JEFFREY S. RECORD  
46994 WALLACE LN  
HOLLADAY UT 84117-5552

EMILIE A. TANNER  
7755 S 4950 W  
WEST JORDAN UT 84081-3616

ZIONS FIRST NATIONAL BANK  
c/o EMPLOYER ADVOCATES LLC  
PO BOX 25236  
SALT LAKE CITY UT 84125-0236



**35A-4-508. Review of decision or determination by division -- Administrative law judge -- Division of adjudication -- Workforce Appeals Board -- Judicial review by Court of Appeals -- Exclusive procedure.**

(8)(a) Within 30 days after the decision of the Workforce Appeals Board is issued, any aggrieved party may secure judicial review by commencing an action in the court of appeals against the Workforce Appeals Board for the review of its decision, in which action any other party to the proceeding before the Workforce Appeals Board shall be made a defendant.

### **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;



## **R994-405-202. Just Cause.**

To establish just cause for a discharge, each of the following three elements must be satisfied:

### **(1) Culpability.**

The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. If the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown. The claimant's prior work record is an important factor in determining whether the conduct was an isolated incident or a good faith error in judgment. An employer might not be able to demonstrate that a single violation, even though harmful, would be repeated by a long-term employee with an established pattern of complying with the employer's rules. In this instance, depending on the seriousness of the conduct, it may not be necessary for the employer to discharge the claimant to avoid future harm.

### **(2) Knowledge.**

The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the employer; however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

### **(3) Control.**

(a) The conduct causing the discharge must have been within the claimant's control. Isolated instances of carelessness or good faith errors in judgment are not sufficient to establish just cause for discharge. However, continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant had the ability to perform satisfactorily.

(b) The Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards. While such a circumstance may provide a basis for discharge, this does not mean benefits will be denied. To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to

perform the job duties in a satisfactory manner. In general, if the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established.

**R994-508-305. Decisions of the Board.**

(1) The Board has the discretion to consider and render a decision on any issue in the case even if it was not presented at the hearing or raised by the parties on appeal.

(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.

(3) The Board has the authority to request additional information or evidence, if necessary.

(4) The Board may remand the case to the Department or the ALJ when appropriate.

(5) A copy of the decision of the Board, including an explanation of the right to judicial review, will be delivered or mailed to the interested parties.

UTAH DEPARTMENT OF WORKFORCE SERVICES  
UNEMPLOYMENT INSURANCE  
DECISION OF ELIGIBILITY FOR  
UNEMPLOYMENT INSURANCE BENEFITS

RECORD ADDENDUM B



DATE MAILED: 3/17/10 ELECTRONIC

DCIN

JEFFREY S RECORD  
4694 WALLACE LN  
HOLLADAY UT 84117-5552

SSN: XXX-XX-X365

EMPLOYER: ZIONS FIRST NATIONAL BANK

**Notice: This decision is made on your claim for benefits:**

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

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

Benefits are denied under Section 35A-4-405(2)(a) of the Utah Employment Security Act beginning February 21, 2010 and ending when you have earned wages in bona fide covered employment equal to at least six times your weekly benefit amount and you are otherwise eligible. To reopen your claim, you can file on-line at [jobs.utah.gov](http://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 Section, PO Box 45244, Salt Lake City, UT 84145-0244, or Fax (801) 526-9242, or online at [www.jobs.utah.gov](http://www.jobs.utah.gov). Your appeal must be in writing and must be received or postmarked on or before April 1, 2010. An appeal received or postmarked after April 1, 2010 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 other 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.

REPR: K Hintze

EMP.#: 1000526

DO NOT WRITE BELOW THIS LINE



UTAH DEPARTMENT OF WORKFORCE SERVICES **ASSISTANT ATTENDANT**  
UNEMPLOYMENT INSURANCE  
DECISION OF ELIGIBILITY FOR  
UNEMPLOYMENT INSURANCE BENEFITS



DATE MAILED: 3/17/10 ELECTRONIC

DCIN

EMILIE A TANNER  
7755 S 4950 W  
WEST JORDAN UT 84081-3616

SSN: XXX-XX-X447

EMPLOYER: ZIONS FIRST NATIONAL BANK

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

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

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

Your claim is denied under Section 35A-4-405(2)(a) of the Utah Employment Security Act beginning February 21, 2010 and ending March 21, 2010. You have earned wages in bona fide covered employment equal to at least six times your weekly benefit amount and you are not eligible. To reopen your claim, you can file on-line at [jobs.utah.gov](http://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.

**HOW TO APPEAL:** If you believe this decision is incorrect, appeal by mail to: Utah Department of Workforce Services, Appeals Section, PO Box 45244, Salt Lake City, UT 84145-0244, or Fax (801) 526-9242, or online at [www.jobs.utah.gov](http://www.jobs.utah.gov). Your appeal must be received or postmarked on or before April 1, 2010. An appeal received or postmarked after April 1, 2010 will not 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.

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

J. K Hintze

EMP.#: 1000547

DO NOT WRITE BELOW THIS LINE



\*10634679\*

Form APDEC  
01

DEPARTMENT OF WORKFORCE SERVICES  
APPEALS UNIT

Decision of Administrative Law Judge

Appellant

JEFFREY S RECORD  
4694 WALLACE LN  
HOLLADAY UT 84117-5552

Respondent

ZIONS FIRST NATIONAL BANK  
%EMPLOYER ADVOCATES LLC  
PO BOX 25236  
SALT LAKE CITY UT 84125-0236

S.S.A. NO: XXX-XX-0365

CASE NO: 10-A-04727

APPEAL DECISION:

The Department decision is affirmed.  
The Claimant is denied unemployment insurance benefits.  
The Employer is relieved of charges.

CASE HISTORY:

Appearances:	Claimant/Employer	
Issues to be Decided:	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 just cause. 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 22, 2010**, 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:

The Claimant filed a claim for unemployment insurance benefits effective February 21, 2010. The Claimant began working for Zion's First National Bank, as a lending information system administrator, on February 12, 1996. The Claimant was discharged on February 22, 2010, for inappropriate conduct in the workplace.

On September 23, 2009, the Employer met with the Claimant to discuss a complaint received on the company hotline alleging that he was having an affair with a coworker. The Claimant denied the allegation.

The Claimant and the coworker were counseled to manage perceptions to avoid creating an uncomfortable work environment.

On November 13, 2009, the Employer met with the Claimant again regarding his relationship in the workplace with that coworker. The Employer felt that the Claimant was not following the counseling. The Claimant asserted he met with the coworker for only work related issues.

On February 19, 2010, the Claimant met with that coworker, in an unused file room. The file room was dark except for a security light that was on near the door. The Claimant and coworker were in the back corner of the file room, where it was quite dark. An employee went into that room to blow her nose. The employee heard a noise and turned on the lights. The employee witnessed the Claimant and coworker in the room. The employee saw the coworker sitting on the Claimant. The employee saw the Claimant and the coworker jump up and pull up their pants. The employee turned off the lights and went outside. The employee waited outside the door and a few minutes later saw the Claimant leave the room and then saw the coworker leave the room. The employee then reported what she witnessed to her supervisor.

The Claimant denied that any inappropriate behavior occurred. He states that he met with the coworker in order to discuss a work issue and then spoke with her about her recent performance review. The Claimant denies removing clothing or having physical contact. The Claimant states that he was only friends with the coworker. The Claimant reports meeting with the coworker in the dark room in order to keep a low profile and not be seen together.

The Employer met with the Claimant who admitted to being in a dark room with the coworker. The Employer did not ask the Claimant what he was doing in the room. The Employer asked the Claimant if he felt that being in a dark room with the coworker was inappropriate. The Claimant agreed it could be viewed as inappropriate. The Employer reminded the Claimant of his prior counseling and sent him home.

The Claimant and the coworker were both discharged on February 22, 2010, for creating a hostile work environment and inappropriate behavior on company property.

#### **REASONING AND CONCLUSIONS OF LAW:**

The Claimant and the Employer witness gave differing versions of the events that occurred on February 19, 2010. The Claimant testified that he *did not engage in inappropriate behavior* with the coworker. The Claimant further states he met with the coworker to discuss a work issue. The Employer witness testified that she had witnessed the Claimant and the coworker engaged in physical contact and pulling up their pants when she turned on the lights. The Administrative Law Judge listened to the testimony of both parties and determined that the Claimant's version of the facts was not as credible as that of the Employer witness.

Section 35A-4-405(2)(a) of the Utah Employment Security Act provides that an individual is ineligible for benefits or for purposes of establishing a waiting period if the employer discharged the claimant for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate; willful or wanton and adverse to the employer's rightful interests. The unemployment insurance rules pertaining to this section provide, in part:

**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 shall 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 worker. A reduction of force is considered a discharge without just cause at the convenience of the employer.

Unemployment insurance benefits must be denied if the employer had just cause for discharging the employee. In order to have just cause for discharge pursuant to Section 35A-4-405(2)(a) there must be fault on the part of the employee involved. The basic factors as established by the Rules pertaining to Section 35A-4-405(2)(a) which are essential for a determination of ineligibility under the definition of just cause are:

- (a) Culpability. The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interests . . .
- (b) Knowledge. The worker must have had a knowledge of the conduct which the employer expected . . .
- (c) Control. The conduct causing the discharge must have been within the claimant's control . . .

In this case the Claimant met with a coworker in a dark room alone and was engaged in inappropriate conduct. The Claimant disregarded the Employer's counsel to keep a professional relationship with the coworker and to manage the perception that others may have of his friendship with the coworker. The Claimant's behavior was inappropriate in the workplace. The element of culpability is established.

The Claimant was counseled on September 23, 2009, to watch perceptions others had of his relationship with a coworker, in order to avoid creating an uncomfortable work environment. The Claimant was warned on November 10, 2009, that he was not changing his behavior towards his relationship with the coworker. The Claimant knew that he had to refrain from personal interaction with the coworker during work time. The element of knowledge is established.

The Claimant had the control from meeting with the coworker in the file room and engaging in inappropriate conduct. The Claimant could have followed the Employer's instructions to avoid interaction with the coworker that would be perceived by others as inappropriate. The element of control is established.

Based on a preponderance of the evidence, the Employer has established the three elements of just cause and benefits are denied.

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 original Department decision denying the payment of unemployment insurance benefits pursuant to Section 35A-4-405(2)(a) of the Utah Employment Security Act is affirmed. Benefits are denied effective February 21, 2010, and continuing until the Claimant has worked and earned at least six times his weekly benefit amount in bona fide covered employment and is otherwise eligible.

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.



---

Alexandra Nigh  
Administrative Law Judge  
DEPARTMENT OF WORKFORCE SERVICES

Issued: **April 22, 2010**

AN/ap

Form APDEC  
06

DEPARTMENT OF WORKFORCE SERVICES  
APPEALS UNIT

Decision of Administrative Law Judge

Appellant

EMILIE A TANNER  
7755 S 4950 W  
WEST JORDAN UT 84081-3616

Respondent

ZIONS FIRST NATIONAL BANK  
C/O EMPLOYER ADVOCATES LLC  
PO BOX 25236  
SALT LAKE CITY UT 84125-0236

S.S.A. NO: XXX-XX-2447

CASE NO: 10-A-06015-R

**APPEAL DECISION:** The request to reopen the hearing is granted.  
Benefits are denied.  
The Employer is relieved of charges.

**CASE HISTORY:**

Original Hearing Date: April 15, 2010  
Date of Appeal Decision: April 15, 2010  
Request for Reopening Dated: April 15, 2010  
Appearances: Claimant / Employer  
Issues to be Decided: R994-508-117 and R994-508-118 - Failure to Appear  
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 discharge for just cause by the Employer. 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 **May 10, 2010**, 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:**

**Failure to Appear**

The Claimant appealed the Department decision denying her claim for unemployment insurance benefits, and a hearing was scheduled for April 15, 2010. The Claimant provided the Department of a number where

she could be reached for the hearing; however, this number was not accurately recorded for the docket information used by the Administrative Law Judge. As a result, the Administrative Law Judge was unable to reach the Claimant at the time the hearing was scheduled to occur, and the hearing was canceled.

The Claimant contacted the Department shortly after the hearing was canceled, and it was discovered that the Department had incorrectly entered the Claimant's information into the docket record. The Claimant was advised to request a reopening in order for another hearing to be scheduled. The Claimant submitted a request to reopen the hearing on April 15, 2010, and another hearing was scheduled.

### **Discharge**

The Claimant filed a claim for unemployment insurance benefits on February 26, 2010, after she was discharged by Zions First National Bank. The Claimant worked for this Employer from January 25, 1993, until February 22, 2010. Prior to her discharge the Claimant worked as a lending supervisor and was responsible for researching titles on vehicles the Employer financed for its customers. The Employer's reason for discharging the Claimant is described below.

During the summer of 2009, the Employer's human resources office received complaints regarding allegations of the Claimant's inappropriate relationship with a coworker. These complaints culminated in an anonymous call made to a third-party employee resource center which was forwarded to the Employer's human resources office. The anonymous call described a romantic relationship between the Claimant and her coworker that the caller felt had become disruptive to the Employer's workplace. A member of the Employer's human resources staff contacted the Claimant and arranged a meeting where the concerns raised by the complaints and anonymous call could be addressed. During this meeting, the Claimant denied anything other than a professional working relationship with her coworker. However, due to the nature of the complaints, the Claimant was advised to refrain from any behavior involving her coworker which could be construed as inappropriate by other staff members.

On February 19, 2010, the Claimant and her coworker were observed in a dark, disused storage room in the Employer's building. A member of the Employer's staff stepped into the room to blow her nose. When this staff member heard noise at the back of the storage room, she turned on the lights and saw the Claimant and her coworker in the back corner of the storage room. The staff member could see that the Claimant and her coworker were partially clothed when both suddenly stood up after she turned on the lights. After seeing the Claimant and her coworker, the staff member turned off the lights and walked away from the doorway. The staff member waited to see who would come out of the room and observed the Claimant's coworker, and then the Claimant leave the room.

The staff member reported this incident to her supervisor, who then advised the Employer's executive vice president about the incident. After interviewing the staff member who observed the Claimant and her coworker, the executive vice president met with the Claimant. The executive vice president asked the Claimant if she thought it was appropriate for her to be in a dark room with a married coworker. The respondent answered, "no." The executive vice president considered the Claimant's response as an indication of her acknowledging the incident had occurred, and immediately suspended the Claimant.

The executive vice president contacted the Employer's human resources office, which in turn contacted the Employer's legal counsel. Based upon the staff member's description of the Claimant and her coworker

Emilie Tanner

- 3 -

10-A-06015-R

partially clothed in a dark storage room, the Employer determined the Claimant's actions were highly inappropriate and disruptive. Consequently, the Employer decided to discharge the Claimant, and announced its decision to her when she was called in to work on February 22, 2010.

## REASONING AND CONCLUSIONS OF LAW:

### Failure to Appear

The Unemployment Insurance Rules pertaining to Section 35A-4-406(3) of the Utah Employment Security Act provide, in pertinent part:

#### **R994-508-117. Failure to Participate in the Hearing and Reopening the Hearing After the Hearing Has Been Concluded.**

(1) If a party fails to appear for or participate in the hearing, either personally or through a representative, the ALJ may take evidence from participating parties and will issue a decision based on the best available evidence.

(2) Any party failing to participate, personally or through a representative, may request that the hearing be reopened.

(3) The request must be in writing, must set forth the reason for the request, and must be mailed, faxed, or delivered to the Appeals Unit within ten days of the issuance of the decision issued under Subsection (1). Intermediate Saturdays, Sundays and legal holidays are excluded from the computation of the ten days in accordance with Rule 6 of the Utah Rules of Civil Procedure. If the request is made after the expiration of the ten-day time limit, but within 30 days, the party requesting reopening must show cause for not making the request within ten days. If no decision has yet been issued, the request should be made without unnecessary delay. If the request is received more than 30 days after the decision is issued, the Department will have lost jurisdiction and the party requesting reopening must show good cause for not making a timely request. . .

(5) The ALJ may reopen a hearing on his or her own motion if it appears necessary to take continuing jurisdiction or if the failure to reopen would be an affront to fairness.

#### **R994-508-118. What Constitutes Grounds to Reopen a Hearing.**

(1) The request to reopen will be granted if the party was prevented from appearing at the hearing due to circumstances beyond the party's control.

(2) The request may be granted upon such terms as are just for any of the following reasons: mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from the operation of the decision. The determination of what sorts of neglect will be considered excusable is an equitable one, taking into account all of the relevant circumstances including:

- (a) the danger that the party not requesting reopening will be harmed by reopening;
  - (b) the length of the delay caused by the party's failure to participate including the length of time to request reopening;
  - (c) the reason for the request including whether it was within the reasonable control of the party requesting reopening;
  - (d) whether the party requesting reopening acted in good faith;
  - (e) whether the party was represented at the time of the hearing. Attorneys and professional representatives are expected to have greater knowledge of Department procedures and rules and are therefore held to a higher standard; and
  - (f) whether based on the evidence of record and the parties' arguments or statements, taking additional evidence might effect the outcome of the case.
- (3) Requests to reopen are remedial in nature and thus must be liberally construed in favor of providing parties with an opportunity to be heard and present their case. Any doubt must be resolved in favor of granting reopening.
- (4) Excusable neglect is not limited to cases where the failure to act was due to circumstances beyond the party's control.
- (5) The ALJ has the discretion to schedule a hearing to determine if a party requesting reopening satisfied the requirements of this rule or may, after giving the other parties an opportunity to respond to the request, grant or deny the request on the basis of the record in the case.

In this case the Administrative Law Judge finds that the facts warrant a reopening of the hearing to allow all parties the opportunity to be heard, and the failure to participate in the hearing was caused by an error on the part of the Department which was beyond the ability of the Claimant to control.

### **Discharge**

In order for a determination to be made that the Claimant's separation from Employment was disqualifying, the Employer must establish that its decision to end the Claimant's employment was made for just cause. Section 35A-4-405(2)(a) of the Utah Employment Security Act explains:

#### **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.

Emilie Tanner

- 5 -

10-A-06015-R

For an employer to establish just cause for discharge pursuant to Section 35A-4-405(2)(a) of the Utah Employment Security Act, there must be fault on the part of the employee involved. The elements of just cause as established by Section 35A-4-405(2)(a) of the Utah Employment Security Act are described in the following terms:

- (a) Culpability. The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest...
- (b) Knowledge. The worker must have had a knowledge of the conduct which the employer expected . . .
- (c) Control. The conduct causing the discharge must have been within the claimant's control . . .

The Employer arranged for the staff member who observed the Claimant and her coworker in the darkened storage room to participate as a witness for the hearing. Both the Claimant, and the Claimant's coworker who was involved in the incident that led to the Claimant's discharge were present during the hearing, and offered testimony that differed from the description of events provided by the Employer's witness. In hearings where conflicting testimony is offered by opposing parties, it is necessary to determine which party offered the most credible testimony. In this case, the Administrative Law Judge finds the testimony offered by the Employer's witness to be more credible than the Claimant's testimony. This credibility decision is made for the following reasons;

It is important to note that the Employer's witness is a disinterested party whose own well-being is not affected by the outcome of a decision to allow unemployment insurance benefits or to charge the Employer's benefit account. Moreover, no testimony or evidence were provided during the hearing to establish the Employer's witness benefitted somehow from the Employer's decision to discharge the Claimant or her coworker. Both the Claimant and her coworker would benefit from denying the incident took place in order to preserve their own reputation, and importantly, to prove the Employer did not have just cause for ending their employment.

Another point of consideration is the validity of the explanation given by her Claimant and her coworker to describe why they were both in a dark, unused storage room on a floor of the Employer's building where neither worked. The Claimant testified she went to the room to meditate in the dark. The Claimant's coworker testified he had questions about a procedure the Claimant had developed which he posed shortly before the Claimant took her break. If the Claimant truly intended to meditate in a dark room during her break, a question is raised as to why she would allow her coworker to disturb her with questions about the Employer's procedures involving financial transactions, rather than telling her coworker she would answer his questions after she finished meditating. This question is further complicated by the previous advice given to the Claimant from the Employer's human resources office to avoid any semblance of unprofessional behavior toward this particular coworker. It is unclear why the Claimant would place herself in a situation which would further fuel speculation about an inappropriate relationship with her coworker, when she had been advised to avoid such situations by the human resources office.

Lastly, the Claimant's testimony describing her initial response to the Employer's accusations is uncharacteristic of the response expected if an unfounded accusation had been made. The Claimant testified she felt intimidated by the vice president's line of questioning, and immediately left the Employer's building without any protest. If the Claimant truly felt the Employer's accusations were baseless, she would have disputed the accusation at the time it was made, rather than denying the incident occurred during an unemployment insurance hearing.

When comparing the testimony offered by the Employer's witness with the testimony offered by the Claimant and her coworker, the Administrative Law Judge finds the Claimant and her coworker were engaging in improper behavior in the Employer's building during office hours, and will consider whether the Employer had just cause for discharging the Claimant in response to this behavior.

The Employer's decision to discharge the Claimant was based upon an isolated incident involving inappropriate behavior in the Employer's workplace. It is important to consider whether the misconduct was simply an "isolated incident of poor judgment," and thus not culpable conduct. As an isolated incident, it is necessary to balance the employee's "longevity and prior work record" against the seriousness of the offense and how likely it is to be repeated. "The proper emphasis under the culpability requirement should not be upon the number of violations; rather, it should address the problem of whether the discharge was 'necessary to avoid actual or potential harm to the employer's rightful interest.'" *Bhatia v. Dept. of Employment Sec.*, 834 P.2d 574, 578 (Utah Ct. App. 1992)(citations omitted).

In this case, another staff member observed the Claimant and her coworker partially undressed in a storage room. If the Employer were to tolerate the Claimant's behavior, the Employer could be held liable for allowing an inhospitable work environment. The staff member who testified during the hearing expressed that she was genuinely shocked when she came across the Claimant and her coworker in the storage room, and the incident made her feel uncomfortable. Because the Employer would eventually be held liable for creating an uncomfortable working environment if it tolerated the Claimant's actions, it had no choice other than to discharge the Claimant to avoid potential harm. Based on this reasoning, the element of culpability is present.

The Employer previously advised the Claimant to avoid creating perceptions among other staff members that she had an inappropriate relationship with her coworker. Meeting with this coworker in a dark room in an area where neither she nor her coworker worked, clearly ran counter to the advice she had been given. The element of knowledge has been shown because the Employer gave the Claimant clear instructions to avoid the kind of situation that led to her discharge.

Both the Claimant and her coworker testified the Claimant's discharge could have been avoided if they had not met under the circumstances where they were discovered by another member of the Employer's staff. Because the Claimant could have prevented her discharge, the element of control is present.

Based upon a preponderance of the evidence, the Employer has proven it had just cause for discharging the Claimant; therefore, the nature of the Claimant's separation from employment would disqualify her from receiving unemployment insurance benefits.

**Employer Charges**

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 Act. In this case the reason for the Claimant's separation is disqualifying; therefore, the Employer is relieved of charges.

**DECISION AND ORDER:****Failure to Appear**

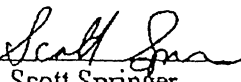
The request for reopening of the hearing is allowed in accordance with provisions of Paragraphs R994-508-117 and R994-508-118 of the Unemployment Insurance Rules for Section 35A-4-406(3) of the Utah Employment Security Act.

**Discharge**

The Department decision denying the payment of unemployment insurance benefits pursuant to Section 35A-4-405(2)(a) of the Utah Employment Security Act is affirmed. Benefits are denied effective February 21, 2010, and until the Claimant has worked and earned at least six times her weekly benefit amount in bona fide covered employment and is otherwise eligible.

**Employer Charges**

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.

  
\_\_\_\_\_  
Scott Springer  
Administrative Law Judge  
DEPARTMENT OF WORKFORCE SERVICES

Issued: May 10, 2010

SS/lel



Form BRDEC  
Issue 01

WORKFORCE APPEALS BOARD  
Department of Workforce Services  
Division of Adjudication

JEFFREY S. RECORD, CLAIMANT  
S.S.A. No. XXX-XX-0365

:

:

Case No. 10-B-00671

ZIONS FIRST NATIONAL BANK,  
EMPLOYER

:

**DECISION OF WORKFORCE APPEALS BOARD:**

The decision of the Administrative Law Judge is affirmed.

Benefits are denied.

The Employer is relieved of benefit charges.

**HISTORY OF CASE:**

In a decision dated April 22, 2010, Case No. 10-A-04727, the Administrative Law Judge affirmed the Department decision and denied unemployment insurance benefits to the Claimant effective February 21, 2010. The Employer, Zions First National Bank, was 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 20, 2010.

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

1. Did the Employer have just cause for discharging the Claimant pursuant to the provisions of §35A-4-405(2)(a)?
2. Is the Employer eligible for relief of charges pursuant to the provisions of §35A-4-307(1)?

**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 the Employer for approximately 14 years. At the time of his discharge he was a lending information system administrator. He was discharged for inappropriate conduct at the workplace. The Department and the Administrative Law Judge denied benefits and the Claimant filed this appeal.

An employee of the Employer company, Brandy Hanson, went into an unused file room on February 19, 2010. She had a cold and wanted to step away from the work area to blow her nose. The unused file room was described as a rather large room and had "security lights" which provided only dim lighting to the room. The door to the room is always left open and was open on this day. Ms. Hanson testified that she heard a rustling in the room so she turned on the overhead lights. She testified she saw the Claimant and another employee, Emilie Tanner, in the back corner of the room. She testified the Claimant was sitting down on a chair and Ms. Tanner was sitting on top of him. As soon as the lights went on, Ms. Hanson testified, the Claimant and Ms. Tanner jumped to their feet and started pulling up their pants. Ms. Hanson immediately turned out the light and left the room. Ms. Hanson testified that she identified the two parties involved but waited outside the room until the two left the room to make sure it was who she thought it was. Ms. Hanson reported the incident to her supervisor. The Claimant and Ms. Tanner were discharged as a result of the incident.

The Claimant and Ms. Tanner testified during the hearing that the two of them had gone to the unused file room to discuss Amergy Renewals. Both testified that they chose the dimly lit, unused file room for this discussion because they had been warned about "managing perceptions" in the workplace. Employees had complained to management that Ms. Tanner and the Claimant were suspected of having an affair. Both had been told that what they did in their private life was their business but in light of the complaints, they needed to "manage the perception" that they were engaging in inappropriate conduct. Both denied they had their pants down or that anything improper occurred in the room.

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 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 Administrative Law Judge's credibility finding will not be disturbed on appeal. 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 and his witness. There is ample evidence in the record to support that finding. The

10-B-00671

- 3 -

XXX-XX-0365  
Jeffrey S. Record

Claimant and Ms. Tanner admitted being in a dimly lit, unused room which the Claimant admits did not show good judgment. While the Claimant explained that he needed to discuss Amergy Renewals with Ms. Tanner, he did not explain why he needed to meet with Ms. Tanner in person to discuss this issue and why he did not ask his questions via email or telephone. There was also some question of the need of the two to discuss that issue at that time. The perception the parties were trying to manage was not well served by agreeing to meet in a dark, unused file room. Finally, while the Claimant alleged Ms. Hanson's friend wanted the job Ms. Tanner got, the Claimant did not provide convincing evidence that Ms. Hanson had a reason to lie about what she saw. The credibility determination is upheld. There is no showing of error.

Department rules provide:

**R994-405-202. Just Cause.**

To establish just cause for a discharge, each of the following three elements must be satisfied:

(1) Culpability.

The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. If the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown. The claimant's prior work record is an important factor in determining whether the conduct was an isolated incident or a good faith error in judgment. An employer might not be able to demonstrate that a single violation, even though harmful, would be repeated by a long-term employee with an established pattern of complying with the employer's rules. In this instance, depending on the seriousness of the conduct, it may not be necessary for the employer to discharge the claimant to avoid future harm.

(2) Knowledge.

The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the employer; however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have

been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

(3) Control.

(a) The conduct causing the discharge must have been within the claimant's control. Isolated instances of carelessness or good faith errors in judgment are not sufficient to establish just cause for discharge. However, continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant had the ability to perform satisfactorily.

(b) The Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards. While such a circumstance may provide a basis for discharge, this does not mean benefits will be denied. To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to perform the job duties in a satisfactory manner. In general, if the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established.

The Claimant knew, or should have known, that being partially clothed in a dimly lit, unused room with another employee during work hours was against the Employer's rightful interest. It is understood that the Claimant vehemently denies that he had his pants down, but the Administrative Law Judge found he did and the Board will not disturb that finding. The knowledge prong of the just cause test was proved.

The Claimant had control over whether he took his pants down in the unused file room. The control element was proved.

The Claimant argues on appeal that the Employer was not harmed by his conduct. The Board disagrees. Employers have a legal duty to keep the workplace free from conduct that will be offensive to other employees or make other employees uncomfortable. The Claimant's behavior did both of those things. The culpability prong of the just cause test was proved.

The Claimant has raised several issues both during the hearing and on appeal in his defense. The Claimant presented photographs of the unused file room for the first time on appeal. These photographs constitute new evidence on appeal.

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:

10-B-00671

- 5 -

XXX-XX-0365  
Jeffrey S. Record**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. To help you remember what you want to present at the hearing, you may prepare a simple chart or written summary with the key information you want to present.

Prepare all evidence and be ready to explain company records, abbreviations, technical terms, and/or symbols. Do not rely solely upon written statements of witnesses as part of your evidence presentation. (See Witnesses and Subpoenas.)

**Prepare Facts**

Facts, not conclusions, are the basis of a good case. Be prepared to answer the questions of who, what, when, where, and why. Saying that an employer is unfair or that an employee is unsatisfactory is a conclusion. Prepare facts that prove the point you wish to make, and present evidence and witnesses that will verify the facts asserted at the hearing.

The notice of hearing which was sent to the parties also included the following instructions:

**ABOUT THE HEARING:** The hearing is your opportunity to present ALL testimony and evidence on the issues. In the event of a further appeal, testimony and evidence that could have been presented at the original hearing may not be allowed.

...

**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 at least three days** 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 Administrative Law Judge also told the parties, at the beginning of the hearing, to be sure and present all the evidence the parties 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.

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.

10-B-00671

- 7 -

XXX-XX-0365  
Jeffrey S. Record

(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.

The Claimant explained on appeal that he did not have access to the facility prior to the appeal and hence was unable to take or present the photographs during the hearing. There is no record that the Claimant asked the Administrative Law Judge or the Employer for permission to enter the facility for the purpose of taking photographs. If he had asked, it is presumed that the Administrative Law Judge would have told the Employer to allow access or to provide the photographs as requested. The problem with providing the photographs at this stage is that the Employer's witnesses are not available at this point to evaluate the photographs and state whether the photos accurately represent the room at the time of the incident. The photographs were not used by the Board in making this decision, but had they been, it is not clear they would have changed the Board's decision in this matter. It seems as though the area where the Claimant and Ms. Tanner were is visible from where Ms. Hanson said she was standing by merely looking through the shelves.

The Claimant alleges on appeal, as he did during the hearing, that he was an excellent employee. The Claimant wanted to present evidence of this during the hearing and presents evidence that he was an excellent employee on appeal. The Employer stipulated during the hearing that the Claimant had been an excellent employee. There was no need for further evidence on that issue.

The Claimant argues on appeal that he was not allowed to present documents or witnesses during the hearing. The Claimant asked to call Mr. Ratliff as a witness during the hearing. Mr. Ratliff was present during the discussion the Claimant had with Mr. Hinds, the Executive Vice President of the Employer company, shortly after the incident in the file room. The Claimant testified that Mr. Hinds never told him the nature of the allegations made by Ms. Hanson and he did not ask the Claimant what occurred in the file room. What occurred between the Claimant and Mr. Hinds after the incident in the file room is not relevant to the resolution of this case. Neither Mr. Hinds nor Mr. Ratliff observed the behavior in the file room, and whether Mr. Hinds told the Claimant the nature of the allegations or asked the Claimant what occurred is not relevant for a finding of just cause. The discharge was based on the conduct in the file room, not what occurred in Mr. Hinds' office. The Claimant has failed to show how any witness or any documents would be relevant to the issue in this matter.

The Claimant complains on appeal, as he did during the hearing, that Mr. Hinds asked him a question during the hearing. The Employer's representative, Mr. Clark, admitted that Mr. Hinds should not have asked the Claimant any questions directly but he could certainly confer with Mr. Clark or Ms. Battista who was also representing the Employer company. The Claimant alleged during the hearing that Mr. Hinds had been excluded from the hearing because he was a witness and had no right to be present during later testimony.

Witnesses are excluded during hearings and trials so that they do not hear the testimony of other witnesses prior to providing testimony themselves. Once a witness has testified, there is no reason for that witness to be excluded from the hearing. Mr. Hinds had testified and there was nothing wrong with him remaining in the room while the Claimant and/or other witnesses testified.

It is agreed that Mr. Hinds should have asked Mr. Clark to ask the Claimant the question. The Department strives to ensure that hearings are orderly and to protect the record. This is necessary for several reasons. With no court reporter present, it is sometimes difficult to identify who is speaking on the recording. Additionally, with multiple people asking and or answering questions at one time there can be "cross talking" or difficulty maintaining order. For those reasons, the Department asks each party to designate a representative who will have the responsibility for asking questions. That does not prevent other parties or witnesses from asking the designated representative to ask a particular question. That was the procedure Mr. Hinds should have followed. The fact that he did not follow that procedure, a procedure he might not have known about, may be a breach of decorum, but does not have an adverse impact on the Claimant's due process rights. Mr. Hinds asking a question was harmless error.

The Claimant also complains on appeal that he was never given the opportunity to present "an A-Z presentation of [his] explanation." The Board disagrees. The hearing in this matter was approximately three hours long—far longer than the average unemployment hearing. The Claimant was asked to present his case and near the end of the hearing he was asked if he wanted to present anything additional. The record shows that the Claimant was given ample opportunity to present his "explanation" any way he wanted to.

It is true that the Administrative Law Judge told the Claimant when he was cross examining witnesses that he needed to limit himself to questions and not testify at that point in the proceedings. This was not an effort to prevent the Claimant from presenting his explanation but rather to provide an orderly process wherein each party has a full opportunity to be heard before moving on to hear from the other party. The Claimant was not unduly limited during the portion of the hearing when the Employer was presenting its case and was given a full opportunity to present his case later in the hearing.

The Claimant complains that there were a "phenomenal amount of claims" made about him and all the testimony, with the exception of the testimony of Ms. Hanson, was hearsay. The only other claims made about the Claimant were that other employees had complained about the Claimant's



10-B-00671

- 9 -

XXX-XX-0365  
Jeffrey S. Record

behavior with Ms. Tanner. Those complaints by those other employees were hearsay. Hearsay is admissible in an administrative hearing, but there must be a residuum of legally competent evidence to support a finding of fact based on hearsay. The Administrative Law Judge did not make any findings of fact based on hearsay.

The Claimant argues on appeal that the Employer's witness testified that the Employer would not discharge someone based on suspicion. This discharge was not based on suspicion but on the testimony of a firsthand witness. The only issue to be determined in this forum is whether the Claimant is eligible for unemployment benefits under Department rules.

The Claimant also argues on appeal that differences in the documentary evidence and the testimony prove that the evidence against him was fatally flawed. The Board disagrees. The Claimant argues, for instance, that Exhibit 8 states that the event occurred at approximately 10:30 a.m. but Exhibit 12 states that it occurred at approximately 9:45 a.m. The Claimant did not raise this issue during the hearing, thereby depriving the Employer of an opportunity to explain this difference. The difference is too small to be significant. The other alleged differences identified by the Claimant were reviewed and are also insignificant.

The Claimant argues on appeal, as he did during the hearing, that the testimony regarding the hospital visit was incorrect. That testimony was not considered in making this decision and therefore an error, if any, is irrelevant.

The Board has carefully reviewed all of the documents, arguments, and evidence presented by the Claimant on appeal. What was not addressed in this decision was found irrelevant.

The Employer proved all the elements of just cause. The reasoning and conclusions of law of the Administrative Law Judge are adopted in full.

**DECISION:**

The decision of the Administrative Law Judge denying unemployment insurance benefits to the Claimant effective February 21, 2010, under the provisions of §35A-4-405(2)(a) of the Utah Employment Security Act, is affirmed.

The Employer, Zions First National Bank, 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

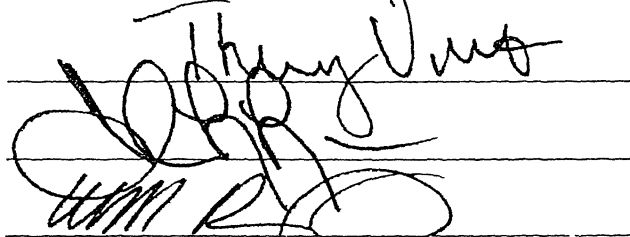
requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person 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.

Date Issued: June 17, 2010

TV/TL/WS/AN/SP/lf

WORKFORCE APPEALS BOARD

The block contains three horizontal lines, each with a handwritten signature. The top signature is in cursive and appears to read 'Jeffrey S. Record'. The middle signature is also in cursive and is more stylized. The bottom signature is in block letters and appears to read 'H.M. R.'.

10-B-00671

- 11 -

XXX-XX-0365  
Jeffrey S. Record

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 17th day of June, 2010, by mailing the same, postage prepaid, United States mail to:

JEFFREY S RECORD  
46994 WALLACE LN  
HOLLADAY UT 84117-5552

ZIONS FIRST NATIONAL BANK  
C/O EMPLOYER ADVOCATES LLC  
PO BOX 25236  
SALT LAKE CITY UT 84125-0236

L. Frohlich

Form BRDEC  
Issue 01

WORKFORCE APPEALS BOARD  
Department of Workforce Services  
Division of Adjudication

JEFFREY S. RECORD, CLAIMANT  
S.S.A. No. XXX-XX-0365

:

:

Case No. 10-R-00860

ZIONS FIRST NATIONAL BANK,  
EMPLOYER

:

DECISION ON REQUEST  
FOR RECONSIDERATION

**DECISION OF WORKFORCE APPEALS BOARD:**

The Claimant's request for reconsideration is granted.

The Board's original decision is upheld.

Benefits are denied.

**HISTORY OF CASE:**

In a letter hand-delivered on July 7, 2010, the Claimant, Jeffrey S. Record, requested reconsideration of the decision of the Workforce Appeals Board issued and mailed in this case on June 17, 2010. 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(1) on the grounds that the decision of the Workforce Appeals Board would otherwise be final agency action within the meaning and intent of that section of law.

**REASONING AND CONCLUSIONS OF LAW:**

The Claimant was discharged after an incident which occurred in an unused file room at the Employer's place of business. During the hearing in this matter, the Claimant alleged the Employer's witness who saw the incident was not truthful. The Administrative Law Judge found the Employer's witness more credible and denied benefits. On appeal to the Board the Claimant presented photographs of the file room. Those photographs were not presented during the hearing and the Board refused to accept the new evidence on appeal.

The Claimant argues in his Request for Reconsideration that the Board should have accepted the photographs of the file room as evidence. In support of his argument the Claimant states that he could not have "foreseen [the] importance [of the photographs and] it is not reasonable to think [the Employer] would have let a terminated employee in the building to film its offices." The Claimant

10-R-00860

- 2 -

XXX-XX-0365  
Jeffrey S. Record

also states on appeal that he tried to get two of his friends to take the photographs for him but they "were too afraid of getting fired for helping him."

The Claimant's arguments are inconsistent. First he argues he could not have foreseen that he needed the photographs and therefore did not obtain the photographs prior to the hearing. Then he argues that he did know that the photographs were necessary and tried to get his friends to take the photographs for him. He also argues "it is not reasonable to think" the Employer would allow him into the building to take the photographs. The Claimant explains, in his Request for Reconsideration, that after he filed suit against the Employer he requested permission to take the photographs. The Claimant was already involved in legal action with the Employer the day he filed his claim for unemployment benefits. He does not explain why he waited until he filed another lawsuit against the Employer to seek permission to take the photographs when he could have asked after he filed his claim for benefits.

Finally, and most importantly, even if the photographs were to be accepted as evidence, it does not prove the Claimant's position. The Claimant states that the photograph was taken while he and Ms. Tanner, the other claimant involved in the same incident and the Claimant's witness at his hearing, were in the position they were in when the Employer's witness saw them. The Claimant also explains the photograph was taken from the place where the Employer's witness stood when she saw the Claimant and Ms. Tanner. The Claimant and Ms. Tanner cannot be seen in the photograph but that does not mean that the Employer's witness could not have seen them as she alleged.

The Employer's witness testified that she could see Ms. Tanner and the Claimant "through" the shelving. Since all of the shelves are the same height and were empty, she could have seen them by looking through the shelving as she testified. More importantly, Ms. Tanner testified in her hearing that she could see the Employer's witness when the lights were turned on. If Ms. Tanner could see the Employer's witness, it must be assumed the Employer's witness could see Ms. Tanner and the Claimant.

**DECISION:**

Pursuant to the authority granted the Workforce Appeals Board in §63-46b-13(3)(a), the Workforce Appeals Board has determined to reconsider its previous decision.

The Board has reconsidered its original decision in this matter. The original decision is upheld. Benefits are denied.

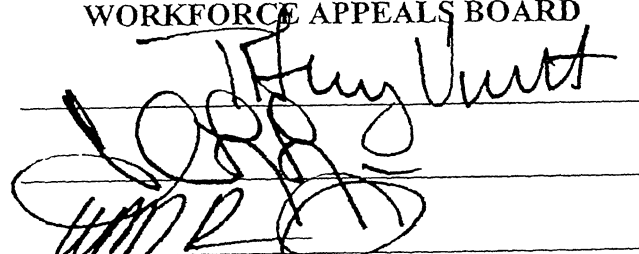
**APPEAL RIGHTS:**

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 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.

Date Issued: August 4, 2010

TV/TL/WS/AN/SP/lf

WORKFORCE APPEALS BOARD  
  
Jeffrey S. Record

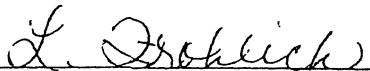
MAILING CERTIFICATE

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 4th day of August, 2010, by mailing the same, postage prepaid, United States mail to:

JEFFREY S RECORD  
4694 WALLACE LN  
HOLLADAY UT 84117-5552

APRIL L HOLLINGSWORTH  
HOLLINGSWORTH LAW OFFICE  
1115 S 900 E  
SALT LAKE CITY UT 84105

ZIONS FIRST NATIONAL BANK  
C/O EMPLOYER ADVOCATES LLC  
PO BOX 25236  
SALT LAKE CITY UT 84125-0236

  
\_\_\_\_\_

Form BRDEC

Issue 01

WORKFORCE APPEALS BOARD  
Department of Workforce Services  
Division of Adjudication

EMILIE A. TANNER, CLAIMANT  
S.S.A. No. XXX-XX-2447

:

:

Case No. 10-B-00743

ZIONS FIRST NATIONAL BANK,  
EMPLOYER

:

**DECISION OF WORKFORCE APPEALS BOARD:**

The decision of the Administrative Law Judge is affirmed.

Benefits are denied.

The Employer is relieved of benefit charges.

**HISTORY OF CASE:**

In a decision dated May 10, 2010, Case No. 10-A-06015-R, the Administrative Law Judge affirmed the Department decision and denied unemployment insurance benefits to the Claimant effective February 21, 2010. The Employer, Zions First National Bank, was 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:** June 7, 2010.

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

1. Did the Employer have just cause for discharging the Claimant pursuant to the provisions of §35A-4-405(2)(a)?
2. Is the Employer eligible for relief of charges pursuant to the provisions of §35A-4-307(1)?

**FACTUAL FINDINGS:**

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



10-B-00743

- 2 -

XXX-XX-2447  
EMILIE A. TANNER**REASONING AND CONCLUSIONS OF LAW:**

The Claimant worked for the employer for 17 years. At the time of her discharge, she was a lending supervisor. She was discharged for inappropriate conduct at the workplace. The Department and the Administrative Law Judge denied benefits and the Claimant filed this appeal.

An employee of the Employer company, Brandy Hanson, went into an unused file room on February 19, 2010. She had a cold and wanted to step away from the work area to blow her nose. The unused file room was described as a rather large room and had "security lights" which provided only dim lighting to the room. The door to the room is always left open and was open on this day. Ms. Hanson testified that she heard a rustling in the room so she turned on the overhead lights. She testified she saw the Claimant and another employee, Jeffrey Record, in the back corner of the room. She testified Mr. Record was sitting on a chair or on a cart and the Claimant was sitting on his lap. As soon as the lights went on, Ms. Hanson testified, the Claimant and Mr. Record jumped to their feet and started pulling up their pants. Ms. Hanson immediately turned out the light and left the room. Ms. Hanson testified that she identified the two parties involved but waited outside the room until the two left the room to make sure it was who she thought it was. Ms. Hanson reported the incident to her supervisor. The Claimant and Mr. Record were discharged as a result of the incident.

The Claimant testified that Mr. Record contacted her to ask her about a work issue. The Claimant testified she was on her way to the unused file room to meditate during her break. She testified she told Mr. Record he could join her there during her break to discuss the work issue. The Claimant and Mr. Record testified in an earlier hearing that they chose the dimly lit, unused file room for this discussion because they had been warned about "managing perceptions" in the workplace. The Claimant testified, during this hearing, that she often went to the unused file room during her break to meditate.

Other employees had complained to management that the Claimant and Mr. Record were suspected of having an affair. The Claimant had been told that what she did in her private life was her business but in light of the complaints, she needed to "manage the perception" that she and Mr. Record were engaging in inappropriate conduct.

The Claimant and Mr. Record testified that they were in the unused file room when Ms. Hanson turned on the light. While the Claimant argued during the hearing, and again on appeal, that Ms. Hanson could not have seen the couple in the corner because of the shelving, the Claimant admitted that she was able to see Ms. Hanson when the light was turned on. Both the Claimant and Mr. Record denied they had their pants down or that anything improper occurred in the room.

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

vidence, and then determine which party is most credible; in other words, determine which version of events is most likely true. 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 Administrative Law Judge's credibility finding will not be disturbed on appeal. 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 and her witness. There is ample evidence in the record to support that finding. The Claimant and Mr. Record admitted being in an unused, dimly lit room after having been told to manage perceptions." While the Claimant explained that Mr. Record wanted to discuss a business issue with her, she did not explain why she needed to meet with him in person to discuss this issue and why they did not discuss it via email or telephone. The perception the parties were trying to manage was not well-served by agreeing to meet in a dark, unused file room. Finally, the Claimant did not provide convincing evidence that Ms. Hanson had a reason to lie about what she saw. The credibility determination is upheld. There is no showing of error.

Department rules provide:

**R994-405-202. Just Cause.**

To establish just cause for a discharge, each of the following three elements must be satisfied:

(1) Culpability.

The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. If the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown. The claimant's prior work record is an important factor in determining whether the conduct was an isolated incident or a good faith error in judgment. An employer might not be able to demonstrate that a single violation, even though harmful, would be repeated by a long-term employee with an established pattern of complying with the employer's rules. In this instance, depending on the seriousness of the conduct, it may not be necessary for the employer to discharge the claimant to avoid future harm.

(2) Knowledge.

The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the

10-B-00743

- 4 -

XXX-XX-2447  
EMILIE A. TANNER

employer; however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

(3) Control.

(a) The conduct causing the discharge must have been within the claimant's control. Isolated instances of carelessness or good faith errors in judgment are not sufficient to establish just cause for discharge. However, continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant had the ability to perform satisfactorily.

(b) The Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards. While such a circumstance may provide a basis for discharge, this does not mean benefits will be denied. To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to perform the job duties in a satisfactory manner. In general, if the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established.

The Claimant knew, or should have known, that being partially clothed in a dimly lit, unused room with another employee during work hours was against the Employer's rightful interest. It is understood that the Claimant vehemently denies that she and Mr. Record were touching or had their pants down, but the Administrative Law Judge found she did and the Board will not disturb that finding. The Claimant had been told that she was to "manage the perception" that she and Mr. Record, a married man, were having an affair. The knowledge prong of the just cause test was proved.

The Claimant had control over whether she took her pants down in the unused file room. She also had control over whether she arranged a meeting with Mr. Record in a dark, unused room. The control element was proved.

The Claimant argues on appeal that the Employer was not harmed by his conduct. The Board disagrees. Employers have a legal duty to keep the workplace free from conduct that will be offensive to other employees or make other employees uncomfortable. The Claimant's behavior did both of those things. The culpability prong of the just cause test was proved.

The Claimant presented photographs of the unused file room for the first time on appeal. These photographs constitute new evidence on appeal.

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. To help you remember what you want to present at the hearing, you may prepare a simple chart or written summary with the key information you want to present.

Prepare all evidence and be ready to explain company records, abbreviations, technical terms, and/or symbols. Do not rely solely upon written statements of witnesses as part of your evidence presentation. (See Witnesses and Subpoenas.)

**Prepare Facts**

Facts, not conclusions, are the basis of a good case. Be prepared to answer the questions of who, what, when, where, and why. Saying that an employer is unfair or that an employee is unsatisfactory is a conclusion. Prepare facts that prove the point you wish to make, and present evidence and witnesses that will verify the facts asserted at the hearing.

The notice of hearing which was sent to the parties also included the following instructions:

**ABOUT THE HEARING:** The hearing is your opportunity to present ALL testimony and evidence on the issues. In the event of a further appeal, testimony and evidence that could have been presented at the original hearing may not be allowed.

...

10-B-00743

- 6 -

XXX-XX-2447  
EMILIE A. TANNER

**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 at least three days before** the hearing. . . .

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

. . .  
**IF YOU HAVE ANY QUESTIONS 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 parties 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.

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.

The Claimant explained on appeal that she did not have access to the facility prior to the appeal and hence was unable to take or present the photographs during the hearing. There is no record that the Claimant asked the Administrative Law Judge or the Employer for permission to enter the facility for the purpose of taking photographs. If she had asked, it is presumed that the Administrative Law Judge would have told the Employer to allow access or to provide the photographs as requested. The problem with providing the photographs now is that the Employer's witnesses are not available at this point to evaluate the photographs and state whether the photos accurately represent the room at the time of the incident. The photograph was not used by the Board in making this decision, but had it been, it would not have changed the Board's decision in this matter. The Claimant admitted that she saw Ms. Hanson when the light was turned on. She testified that she thought it was another individual but she was able to see clearly enough to know it was a woman, and not a man. If the Claimant could see Ms. Hanson, it is not unreasonable to believe that Ms. Hanson could see the Claimant and Mr. Record.

The Claimant argues on appeal that the photograph proves that someone standing where Ms. Hanson was could not have seen the Claimant or Mr. Record. The Claimant alleges that when the photograph was taken, the photographer was standing where Ms. Hanson testified she was standing

10-B-00743

- 8 -

XXX-XX-2447  
EMILIE A. TANNER

and the Claimant was in the corner of the room where she agrees she was on February 19, 2010. The Claimant alleges Ms. Hanson could not have seen her. If that is true, the Claimant fails to explain how she could see Ms. Hanson. It appears that the reason is that since the shelves are all aligned at the same heights, one could just look through the shelves to see to the other side of the room.

The Claimant requests a new hearing to introduce the photograph into evidence to prove that Ms. Hanson could not have seen the Claimant. The request is denied. The Claimant could have obtained this photograph prior to the hearing. The Board will not allow the Claimant to re-litigate this case based on the photograph. The room was adequately described during the hearing. The photograph is not inconsistent with Ms. Hanson's testimony as it is apparent how Ms. Hanson could have seen to the back of the room. Finally, and again, the Claimant has not shown why she could see Ms. Hanson but Ms. Hanson could not see her.

The Claimant argues on appeal that the Administrative Law Judge found that the Claimant would have acted differently, when she was sent home early on February 19, 2010, if she had been innocent of the allegations. The Claimant had a discussion with the Employer's executive vice president, Mr. Hinds, shortly after the incident. The Administrative Law Judge states that Mr. Hinds asked the Claimant if she thought it was appropriate for her to be in a dark room with a married man. The Claimant answered "no" to the question. The Claimant argues on appeal that Mr. Hinds asked her "if it was inappropriate for a married man to be in a dark room with an unmarried female?" To which the Claimant answered "no." The discharge was based on the conduct in the file room, not what occurred in Mr. Hinds' office. Even if the Claimant told Mr. Hinds it was not inappropriate to be in a dark room with a married coworker, the Employer felt that it was under these circumstances. The Claimant had been warned about the mere appearance of impropriety. She should have known being in the back corner of a dimly lit, unused file room with Mr. Record was inappropriate.

The Employer proved all the elements of just cause. The reasoning and conclusions of law of the Administrative Law Judge are adopted in full.

**DECISION:**

The decision of the Administrative Law Judge denying unemployment insurance benefits to the Claimant effective February 21, 2010, under the provisions of §35A-4-405(2)(a) of the Utah Employment Security Act, is affirmed.

The Employer, Zions First National Bank, 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

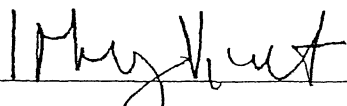

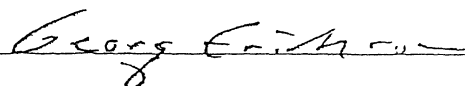
for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. 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.

Date Issued: July 14, 2010.

TV/GE/RH/SS/SP/cd

**WORKFORCE APPEALS BOARD**

  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_



10-B-00743

- 10 -

XXX-XX-2447  
EMILIE A. TANNER

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 14th day of July, 2010, by mailing the same, postage prepaid, United States mail to:

APRIL L HOLLINGSWORTH  
HOLLINGSWORTH LAW OFFICE LLC  
1115 S 900 E  
SALT LAKE CITY UT 84105

EMILIE A TANNER  
7755 S 4950 W  
WEST JORDAN UT 84081-3616

ZIONS FIRST NATIONAL BANK  
% EMPLOYER ADVOCATES LLC  
PO BOX 25236  
SALT LAKE CITY UT 84125-0236

  
\_\_\_\_\_

BRDEC  
01

WORKFORCE APPEALS BOARD  
Department of Workforce Services  
Division of Adjudication

ILIE A. TANNER, CLAIMANT  
A. No. XXX-XX-2447

:

Case No. 10-R-01013

:

RECONSIDERATION

NS FIRST NATIONAL BANK,  
PLOYER

:

**DECISION OF WORKFORCE APPEALS BOARD:**  
Claimant's request for reconsideration is denied.

**STORY OF CASE:**

On appeal faxed August 3, 2010, Claimant, Emilie A. Tanner, requested reconsideration of the decision of the Workforce Appeals Board issued in this case on July 14, 2010. The decision of the Workforce Appeals Board is 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-3) on the grounds that the Board's decision was final agency action within the meaning and intent of that provision of law.

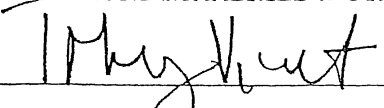

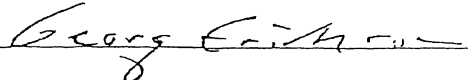
**DECISION:**

The Claimant's request for reconsideration is denied. The decision of the Workforce Appeals Board dated July 14, 2010, 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 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 27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_

Date Issued: August 24, 2010

/GE/RH/SS/SP/cd

0-R-01013

- 2 -

XXX-XX-2447  
EMILIE A. TANNER

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 24th day of August, 2010, by mailing the same, postage prepaid, United States mail to:

APRIL L HOLLINGSWORTH  
HOLLINGSWORTH LAW OFFICE LLC  
1115 S 900 E  
SALT LAKE CITY UT 84105

EMILIE A TANNER  
7755 S 4950 W  
WEST JORDAN UT 84081-3616

ZIONS FIRST NATIONAL BANK  
% EMPLOYER ADVOCATES LLC  
PO BOX 25236  
SALT LAKE CITY UT 84125-0236

  
\_\_\_\_\_

MAR-10-2010 WED 04:47 PM  
MAR-10-2010 01:32 PM LMSL - TOPS 0016440090

FAX NO.

ADDENDUM E  
DWS 03/10/10 @ 16:49  
P. 05  
3/10 ✓  
RECORD

## MEMO

November 10,, 2009

**Deborah A. Battista**  
VP Human Resources Zions Bancorporation

***Subject: Follow up to discussions with Emilee Tanner and Jeff Record***

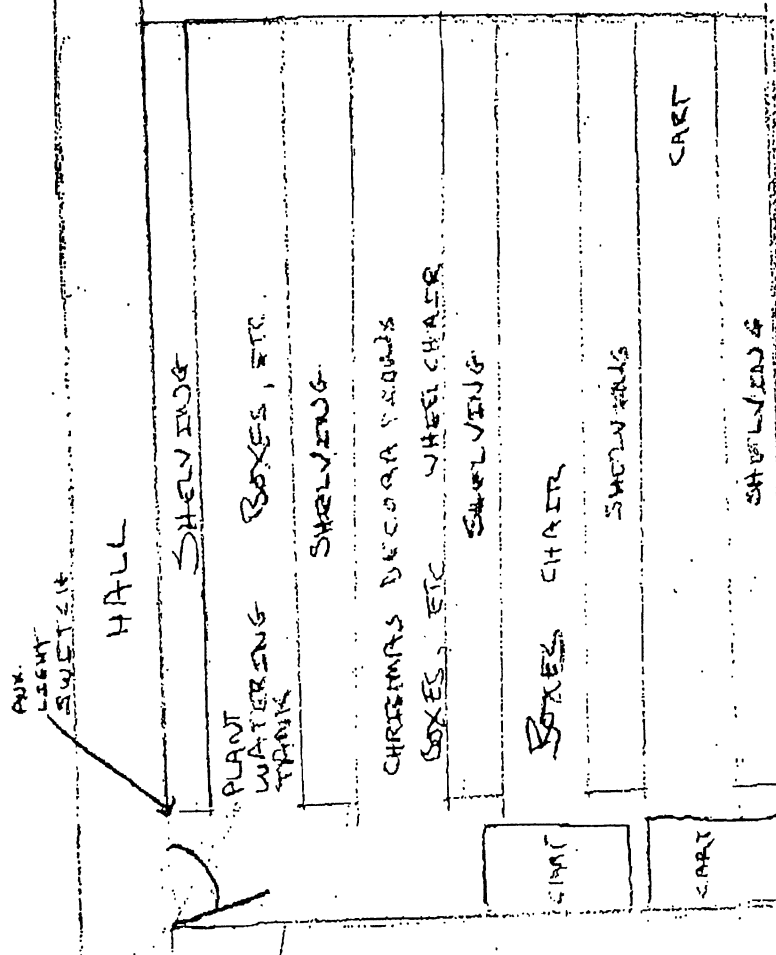
Spoke with both Brent Marriott (acting Manager of CLS) and David Hinds (EVP RLC) regarding the continued relationship between Emilee and Jeff while at work.

- Both Emilee and Jeff went to the hospital together to see Shari Lance. Emilee took a vacation day, Jeff was absent from work.
- David Hinds received calls from the affiliates with personal information regarding Shari's health. He expressed concern for both these employees who appear to communicate freely about Shari's illness.
- Brent reported that both Emilee and Jeff continue to meet behind closed doors. Jeff has been seen on his cell phone excessively which Brent determines as personal calls.
- We continue to believe that both employees have not made necessary changes in their working relationship and appear to disallow out directives.
- David Hinds writes, "I talked to Dave Ratliff this morning and asked him to have a very serious conversation with Jeff Record. Jeff will not be back into the office until Thursday so he will do it then. Merrill Riggs (acting manager) will do the same with Emily today. Dave was wondering if you had the documentation on your discussion with Jeff so he could refer to it and make sure it's in Jeff's employee file. We should probably do the same with Emily."
- "I feel that Jeff and Emily are kicking sand in our face and being very insubordinate in disregarding the counsel they have been given. The resolution was put in their court and they have chosen not to act."
- "I will be out of the office on Thursday and Friday. Maybe you could follow up with Dave Ratliff and Merrill to see how their conversations went."

DAB  
11/14/09

RECORD

COLLECTIONS



## ADDENDUM E

### RECORD

JUDGE Yes. The two pages, plus a cover sheet. The – the cover sheet –

CLARK I'm sure my cover sheet is different than yours. Mine –

JUDGE Okay. Yes. We can – we can disregard the cover sheet. I will just add the two pages. Let me add those documents to the exhibits. One moment. All right, so Exhibit Number 19 is a written map of the collections area. And Exhibit Number 20 then will be the e-mail from David Hinds to David Ratliff.

Those are all the exhibits before me. Is there any objection to these documents being considered as a part of my decision? Mr. Record?

CLAIMANT No, ma'am.

JUDGE Mr. Clark?

CLARK No, no objection.

JUDGE Thank you. Exhibits 1 through 20 are admitted as evidence.

I will now begin the testimony portion of the hearing, by – by asking Ms. Battista some questions.

BATTISTA Okay.

JUDGE Ms. – Ms Battista, you stated you are the Vice President of HR; is that correct?

BATTISTA Yes, Your Honor.

JUDGE Okay. Can you tell me Mr. Record's date of hire, or start date?

BATTISTA Let me verify that. Okay, so the date of hire is February 12th, 1996.

JUDGE And what was his last day of work?

BATTISTA February 22nd, 2010.

JUDGE And what was Mr. Record's job title or position?

BATTISTA Lending Information System Administrator.

JUDGE All right. And what was his rate of pay?

BATTISTA Was \$39.09 an hour.

RECORD

JUDGE All right. And – and was Mr. Record terminated, or did he quit?

BATTISTA He was terminated for cause.

JUDGE And what was the reason that Mr. Record was given for his termination?

BATTISTA Termination was creating a hostile work environment, and inappropriate behavior in the workplace.

JUDGE All right. And can you tell me was there an incident that occurred prior to his termination that caused this termination?

BATTISTA Yes, Your Honor. On Friday, February 19th, 2010, at approximately 10:30 a.m., an employee had witnessed he – Jeff Record, and another employee, Emilie Tanner, together in a dark back room behind the mailroom.

JUDGE Who was this employee that witnessed this?

BATTISTA Her name is Brandy – let me look up her last name just to be sure. And we have her here as a possible witness. Her last name is Hanson, it's H-A – let me just check to make sure.

JUDGE All right.

BATTISTA Hanson. It's H-A-N-S-O-N. She is one of the witnesses that stepped outside.

JUDGE And – and what did Ms. Hanson witness on February 19th?

BATTISTA She went into a back room, actually to blow her nose, and heard a rustling sound, and flipped on the lights. And she observed the two employees putting clothes back on. She waited outside to make sure that she saw what she saw, in terms of who they were. And I think that took about three to five minutes. And then she went into her supervisor's office, and her supervisor then went into our executive vice president's office, David Hinds.

And from there David called me. So he called me within about 30 minutes of this happening. And I had advised him to individually bring both employees in, and to take their badge, and to remove them from the workplace, to give us the appropriate time to – to look into everything.

JUDGE And was it – did you investigate what happened?

BATTISTA Yes. You know the witness, Brandy, had given us a full statement. I was not present in the building on that Friday but David Hinds, and also David Ratliff, they were both present here when Jeff was called into his office. And they did go back, and David Hinds

## ADDENDUM E

### RECORD

did take a look at the room in question. And he is also here and can give testimony as well.

JUDGE All right.

CLAIMANT Your Honor. I – I neglected to catch one comment Ms. Battista just made regarding the sequence of events with Ms. Hanson's testimony. Is there a chance that that could be repeated?

JUDGE Okay. Yes. Ms. Battista, can you tell us again, what was the sequence of events after Bran (sic) – Ms. Hanson witnessed this – this incident at 10:30 on the –

BATTISTA You know I can – I can certainly repeat that as – as I've been told. But on that given day, the Friday, I was not present here in the building. So I do – do want Your Honor to know that David Hinds, and the witness, Brandy Hanson, are available for testimony.

JUDGE All right.

BATTISTA I understand the sequence of events is that when the employee observed the two people she believed she knew who they were but knew that she had to report it. But knew that she just wanted to step aside and wait for them to come out of the room so that she could be sure she knew, and identify both of them.

When she did that, she immediately went into her supervisor's office. And from there they both went into David Hinds' office, who's the executive vice president.

JUDGE All right. And did you question Mr. Record regarding the incident?

BATTISTA David Hinds did. I was not present in the building on the Friday. David Hinds, through my advice, brought in both employees separately, questioned them separately. And what - did have Jeff's supervisor – or actually his manager, David Ratliff, present when Jeff was asked to leave the building that Friday.

And then we had requested both parties to return on Monday, where we all had met and discussed. In that period of time after I was, you know, advised of this I went to seek our legal counsel, and you know, presented the information, as I knew it as of Friday. And we conferred on the grounds for termination. And then on Monday, when both employees were back, I conducted the termination with them separately Monday morning.

JUDGE Was that on the 22nd of February?

BATTISTA Yes, Your Honor.



## RECORD

JUDGE And you terminated both Mr. Record, and -

BATTISTA Emilie Tanner.

JUDGE - Emilie Tanner?

BATTISTA Yes, Your Honor.

JUDGE All right. Did Mr. Record ever admit to this incident directly to you?

BATTISTA Not directly to me, but I understand he did to David Hinds.

JUDGE Okay. And did – did Ms. Tanner admit to the incident as Ms. Hanson saw it to you?

BATTISTA Actually I believe in – and I would prefer you ask David Hinds, but I'm – I'm told that she admitted to being there with Jeff Record.

JUDGE And had there been any prior warnings, or write-ups, related to inappropriate behavior, or creating a hostile work environment, for Mr. Record?

BATTISTA Yes, Your Honor.

JUDGE Can you tell me the date of the prior warning?

BATTISTA I received – we have a third party vendor, which is Global Compliance. And I received – it comes from an anonymous employee, and is sent to someone in my position. I did bring him in to discuss this. We received the complaint about Jeff, and Emilie, and that was – the complaint I have is September the 17th. And as I said, this is from an anonymous employee, but it's a printed report that we get from our vendor, Global Compliance.

I also - through another termination of another employee in July, Jeff was advised that he had witnessed an inappropriate action in – in the parking lot in a vehicle. And so really starting July I started to look into this information, and then brought – brought both of them in individually and talked to them. And that was back, you know, in the September timeframe.

We never put either one of them on a – what we call a probation, but this is like the first part of discipline where we talked about the inappropriate behavior. I had advised Mr. Record that there was one formal complaint through the – through vendor, but I had also had two or three employees that did not want to be identified, but had also stated that they had some concerns about the hostile work environment.

And so as I looked into this and brought both of them in I did document that in – I think

RECORD

that's Exhibit 11 that I'm referring to, on September 23rd. So that's really the first time that I actually documented my conversations about this. But it was not viewed as, you know, probation. It was just a – a formal counseling session.

JUDGE All right.

BATTISTA From – from there the – the next time that I actually was given some additional information to look into I documented another one, which is – well I guess that's Exhibit 10.

JUDGE Exhibit – did you say 10?

BATTISTA Yeah, I think it's 10.

JUDGE Okay. And what was this documentation regarding?

BATTISTA It was a followup to both of them, because I had a couple of their managers tell me that there was this being together, and they were asked to kind of, you know, stay apart unless it was a business reason. But they had been observed together. And they had also – one of our managers had a very serious illness, and the both of them went together to the hospital room. And so his manager had some concern about that, in terms of leaving the workplace and going together to this person's hospital room.

And so I had a – a last conversation. I had not talked, at that time, to Mr. Record since about November the 10th. So that was a followup. To just reenforce – once again it was not probation. but to reenforce. And then there was no other further conversation with me until this incident in February.

JUDGE Okay. Now what was the complaint that was made on – on September 23rd – or September 17th, from this vendor, Global Compliance?

BATTISTA It's a – states it from an anonymous caller. It's re (sic) – subject is Jeffrey Record, at – you know, it has his title. The other subject is Emilie Tanner. The report summary is unprofessional relationship within the office. There is probably 15 bullet points in terms of what this person reported. Do you want me to read them to you?

JUDGE Well I – I have five – well this is – the issue summary is just what you told –

BATTISTA Yes.

JUDGE - Mr. Record, and – and – and Emilie Tanner? Okay.

BATTISTA Right. Some – some – I could just give you a couple, if I may.

RECORD

- JUDGE Okay. Yeah, tell me what the – the main complaints were.
- BATTISTA So the employee has written. "That Jeff is married and cheating. I don't know their exact relationship but it's serious enough to look like he's cheating. Too personally – it's too personal for a work environment. It's unprofessional and affects coworkers. I am coming forward now because it isn't stopping and I'm tired of dealing with it."
- JUDGE And what did the complaint say that made them think that Mr. Record, and – and – and Emilie Tanner were cheating?
- BATTISTA It – I don't know. It goes on to say. "It appears that they don't care who knows about their relationship and they aren't getting in trouble for it. Everyone just pretends that it's not happening." The other comments are about Emilie.
- JUDGE All right.
- BATTISTA It does say that. "Both are away from their desk for long periods of time, not just a lunch hour, or a 15-minute break. He is not able to do projects, and meetings until after 3:30 because of her jealousy. Both managers just ignore this. They - they might have talked to their employees but they're not really doing anything about it." And that's why I was asked to step in and to speak to both of them after this complaint.
- JUDGE And – and what was the – what was their response? What was Mr. Record's response when you spoke to him on the 23rd regarding this complaint?
- BATTISTA You know I spoke with Mr. Record for about 90 minutes. And, you know, the – the conclusion of that is that he unequivocally denied any inappropriate behavior with Emilie. That they were friends, that this was a working relationship. You know I advised him that there was no formal discipline, that I would not discuss this with anyone outside. And I didn't even discuss it with his manager at the time. Just said that he had to manage the perception. And, you know, basically that, you know. I had to bring his attention because there were formal complaints.
- You know, Jeff really discussed the department, and how his daily activities, 'cause I never felt that his actions were inappropriate. I reminded them to both watch for perception, and really ensure that they don't create an uncomfortable working environment. And at that time, in September, I told him no further action would be required.
- JUDGE Okay. And – let me see. Now did – did Ms. Tanner ever admit to an inappropriate relationship with Mr. Record to you?
- BATTISTA No, she did not. She once again stated that this was a – just a working relationship, and that there was no inappropriate behavior on her part.

RECORD

- JUDGE All right. Are you aware of any other complaints that occurred?
- BATTISTA I – I have had two employees around the September timeframe come into my off (sic) – office, but asked to be, you know, anonymous, but that wanted to be sure that I took this complaint serious and that I would look into it. I didn't – you know, I just listened to them and thanked them for coming in. and I just proceeded. so.
- JUDGE All right. Is there anything else you would like to add regarding Mr. Record's separation?
- BATTISTA Not at this time. Your Honor.
- JUDGE All right. Mr. Clark, do you have any questions for Ms. Battista?
- CLARK Yes, thank you, Your Honor. Ms. Battista, suppose there were no history leading up to this final event, suppose you didn't have these other conversations and so forth, what difference if any would that have made?
- BATTISTA None in this incident. According – according to our – our ethics code of conduct this would have been grounds for a termination, as it was inappropriate behavior in the workplace. And that situation alone would have caused a termination, without the prior history.
- CLARK Do you know if – if – if they in fact did avoid each other after your meetings with them?
- BATTISTA I can't confirm that. In the followup meeting that I had in November both had said – well actually not both. Jeff Record had stated to me, you know. I've done everything that you asked me to do. I have, you know, stayed away from her. But we do – we don't believe that that is true because people have continued to complain about them being together.
- CLARK Mr. Record has gone on record saying that that conference, or that – that file room that – that was apparently the – the alleged area where this allegedly took place. and saying the door was open and the lights were on. Could you respond to that?
- BATTISTA Yeah, the door remains open. It is an unused, you know. large area, it wasn't (phonetic) - behind the mailroom. There is a – just a security light that is always on. So the door could have been open, and the security light remains on. But my understanding is that the employee flipped the light switch on, which would have lit the entire area. So it's quite dark in – in most of that room 'cause the security light is just in the front by the doorway.
- CLARK And do you know if the area where this incident took place was – was lighted by the security light?
- BATTISTA I would say that, you know – my looking at it, and I looked at it even again today. is that

## RECORD

the – the light – the – the one beam of light, it kind of lights up maybe just where the light switch is, the door. But that entire room is pretty dark without turning on the main light.

CLARK And as a matter of fact we went in that room today, correct?

BATTISTA Yes. We all went into that room and we – I – you and I went in and changed roles. But we went into that corner where – where we believed that they were – where he said he was, and it is really dark. But when you flip a light switch on you can see very clearly. As I'm sure this witness will testify to.

CLARK Yes, okay. Which floor does – does Mr. Record work on – and I – I gather it's in this building; is that right?

BATTISTA It is in this building. There are two floors and he was on the second floor.

CLARK And –

BATTISTA This room is on the first floor.

CLARK Okay. And do people on the first floor, and the people on the second floor, do they intermingle all the time, or –

BATTISTA There are really five different, you know, departments. The room – the department of collections is the closest to this. He doesn't work in collections. You know it's hard to say if somewhere in the processing. But generally speaking these departments are separated in their roles, and functions, and who they deal with.

CLARK And do you know if Mr. Record has his own office?

BATTISTA Yes, sir.

CLARK And do you know if on the second floor, where Mr. Record's office is apparently, do you know if – if there is a conference room there that could be used for meetings?

BATTISTA Yes, sir. And there are conference rooms on both floors.

CLARK Your Honor, I don't have further questions of this witness at this point. Thank you.

JUDGE Thank you. Mr. Record, do you have any questions for Ms. Battista?

CLAIMANT I do. I hope that I can remember them all. I tried to take notes. When – when Ms. Batista reported that Mr. Hinds questioned me about the nature of the activity in that room that would be untrue. I did not admit to the alleged incident because it was never told to me. I didn't learn of the allegation of the state of undress until 20 days later,

RECORD

JUDGE I am just going to place you under oath to provide testimony at this hearing, all right?

HANSON Okay.

OATH ADMINISTERED: Ms. Hanson answered in the affirmative.

JUDGE Ms. Hanson, were – did you witness an incident that occurred on February 19th?

HANSON I did.

JUDGE And can you – can you tell me what did you witness?

HANSON I – I work downstairs. And so I don't – I was sick that week. Don't like to blow my nose at my desk so I went into an empty file room that's no longer in use. And – to blow my nose. And I walked in and I heard some rustling around. Flipped on the lights and saw Jeff and Emilie. Jeff jumped up, pulled his pants up. Emilie did the same. And I flipped off the lights, walked out of the room. I stood right outside of the room.

I waited to – 'cause I wanted to make sure it was who it was that I saw. So I stood outside of the room, and about four to five minutes later Jeff Record came out and went into my boss' office. And about – and I stood there and waited, and about two minutes later Emilie walked out and went upstairs. And then at that time I went to my manager's office.

JUDGE Okay. You – you stated you had to turn the lights on. Were there any lights on in the – the room when you went into that empty file room?

HANSON There are security lights that are really dim, but they were in the very back of the room. And it's an empty file room so – and it's got like bookshelves that are empty. And the very back of the room is pretty dark. And so that's when I flipped the lights on to see what the noise was. When I saw them back in the back.

JUDGE And when you saw them what did you see, were they sitting, standing, what were – were they doing?

HANSON Jeff was sitting, Emilie was sitting on him. And as soon as I flipped on the lights they both jumped up and pulled their pants up.

JUDGE All right. And you stated you – you waited outside the room to verify who it was. Was it hard to see who – who was actually sitting back there?

HANSON No it wasn't, but I just wanted to make sure, because I was going to report it to my manager. I just wanted to be 100% sure if that's who it was.

RECORD

JUDGE All right. And you said Jeff jumped up and – and left five minutes later; is that correct?

HANSON Yeah, it was approximately four to five minutes later.

JUDGE And he went to – to what office?

HANSON He went into my manager's office, which is Jeff Mather.

JUDGE Okay. All right. And then what did you do after you witnessed this?

HANSON What did I do?

JUDGE Uh-huh.

HANSON I walked – after I saw Emilie walk upstairs I went into my manager's, which is right next door to Jeff Mather's office, and I closed the door and told her what happened.

JUDGE All right. Is there anything more that you would like to add regarding this incident?

HANSON No, that will be it.

JUDGE All right. Mr. Clark, do you have any questions for Ms. Hanson?

CLARK Yes. Ms. Hanson, Exhibit 19 looks like a diagram of that room. Would you look at that and tell me if that's the room that you remember?

HANSON (Inaudible).

CLARK According to that diagram about where were the two parties that you're talking about, Mr. Record, and Ms. Tanner?

HANSON They were in the back right corner where – at those carts.

CLARK Okay. And where were you standing?

HANSON At the – in the doorway.

CLARK Now I see, according to this diagram. that there are some shelves between anyone standing there, and a cart. How were you then able to see what was going on back there?

HANSON The shelves are empty so you can see right through them.

CLARK So the shelves aren't – don't block anything, or –

RECORD

HANSON Well you have to walk through the mailroom to get to the – but no, I wasn't in the mailroom.

CLAIMANT Okay, 'cause there – there was considerable talking in the mailroom. I wondered if you had been part of that.

HANSON No.

CLAIMANT Please describe the room, and its contents.

HANSON The file room?

CLAIMANT Yes, please.

HANSON Well it looks like Exhibit 19 is – is obviously – I mean that – that is how the room is set up. So there's shelving that is not being used. I don't know, I have – I don't go back there very often because it's not in use. I mean the only time I really have ever gone back there is to blow my nose, so.

CLAIMANT In your exhibit you referenced that we were sitting on a chair?

HANSON I believe it was a chair. It might have been the cart that's back there/

CLAIMANT Well I wondered if you could describe the chair because it sounds as if you think you saw quite a bit.

HANSON I believe it was a red chair. And there is a red chair that is back there.

CLAIMANT And where is the red chair situated?

HANSON It was sitting right in front of the cart, but now it is in a different – now it's down a different aisle.

CLAIMANT Do you have to open the door to enter the storeroom?

HANSON No, the door is open.

CLAIMANT And you already suggested that the room was lighted with security lights. They're always on, correct?

HANSON The security lights, but I mean those are very dim.

CLAIMANT Still light. I – I can actually describe the room based on the lighting that was provided.



RECORD

which I do not believe to be true.

JUDGE Okay. Well – well we do have – they're stipulating that your performance was not an issue. You did bring up the fact that whether you were complying to Ms. Battista's statement that you – you did need to -

CLAIMANT Control perception (unintelligible) -

JUDGE - control your perceptions, yes. So I – I will – well I will keep that in mind and – and after your testimony we will – I will see if that would be necessary. At this point – Ms. Hanson, are you still there?

HANSON Yes.

JUDGE Could you – could you call Mr. Hinds in, and then you are excused to – to leave.

HANSON Yes, I will.

JUDGE Thank you.

HANSON This is David Hinds. Your Honor.

JUDGE Okay. Hello, Mr. Hinds.

HINDS Yes, Your Honor.

JUDGE I will just place you under oath.

OATH ADMINISTERED. Mr. Hinds answered in the affirmative.

JUDGE All right, thank you.

HINDS You're welcome.

JUDGE Mr. Hinds, what is your position with the company?

HINDS I'm the Senior Vice President – or excuse me – Executive Vice President, responsible for retail credit for the corporation.

JUDGE Okay. And did you question Mr. – Mr. Record regarding an incident with Ms. Tanner?

HINDS Yes, I did. I – I questioned him after it was brought to my attention about an incident in a – in a file room. And I called Mr. Record into my office, questioned him about it, and asked him if he thought that being in a – a dark room with a – another room on company

## ADDENDUM E

### RECORD

time was appropriate. And he disclosed that he didn't think it was appropriate. And at that time I asked Mr. Record to – to leave the building.

JUDGE Now when did you question Mr. – Mr. Record regard this?

HINDS It was – it was approximately – oh I'm going to say – well it was February 19th, the day of the – the day of the incident. And it was about a half an hour after – after the occurrence. I'd say between a half an hour, and – and 40 minutes, after I was notified of what had happened. So it was – it was within – within the hour.

JUDGE All right.

HINDS Of the incident.

JUDGE And did you ask Mr. Record what he was doing with Ms. Tanner in the file room?

HINDS I – I didn't ask Mr. Record what he was doing in the file room with Ms. Tanner. I just asked him if he was in the file room with Ms. Tanner.

JUDGE Okay. And he – and he did admit to being in the file room; is that correct?

HINDS Yes, he did.

JUDGE All right. Is there anything more you would like to add regarding Mr. Record's termination?

HINDS The only thing that I would like to add is, when I did have Mr. Record in my office after the incident I had David Ratliff, who is the manager for that department, in my office with me. So David Ratliff would also be able to validate the conversation that I had with Mr. Record.

JUDGE All right. Mr. Clark, do you have any questions for Mr. Hinds?

CLARK Yes. Mr. Hinds, when you had that meeting with Mr. Record it was – was Emilie Tanner also in that meeting?

HINDS No, I – I chose not to talk to them together. I talked to – I think – I think I talked to Jeff Record first. And then after I talked to Jeff Record then I talked to Emilie Tanner separately. And at – do I –

CLARK Yeah. Well just – just briefly. Did – did – did Emilie Tanner have anything different to say than what (unintelligible) –

HINDS No. I also had – I had David Ratliff, and David Madison (phonetic) in my office at that

## RECORD

time when I talked to Emilie Tanner. And I asked her the exact same question that I asked Jeff Record. Do you feel it was inappropriate behavior to be in a dark – a dark room with another man? And she said, "It was inappropriate behavior."

CLARK Now you say in a dark room. You – you obviously are aware of the lighting situation there. Could you just briefly (unintelligible) -

HINDS Well there – there are – yeah. I – I say dark room because when – after the incident happened I – I asked the employee, Brandy, and her manager, Jeff, to take me back there. And there are a string of – I think we call them security lights that make it not a totally dark room. But from where Brandy stood, and to where she told me they were, with the lights off it's dark. You – you can't – you can't see where they were until you turn the lights on, and then it lights the room up. So I would – I would – guess I would say it's not a totally dark room. But it's a dark – it's dark back in – in – in the corner. You can't – you couldn't see anybody that was back there.

CLARK Is that door closed or open?

HINDS It's – it's an open – it's just an open door. I mean anybody can go in there. It's not a locked door. It – it's an old file room that we recently cleaned out. And we're going to look for another purpose for that room. But it's an old file room with file cabinets in there, and stuff.

CLARK And are there any chairs in that room?

HINDS Yeah. There – there are – well I just went back there today. I've only been – I've only been in the – in the place two times in the last year. One of them was the day this incident happened, and the other time was – was today when – when you and I walked back there. But yeah, there are – there are a few chairs in that – in that – in that area.

CLARK And based on this drawing, which is Exhibit 19 –

HINDS Yeah.

CLARK - is that – is that a good representation of that room?

HINDS You know, it's just about dead on. There's a – there's a – that cart back in the corner. Which that cart was there the – the day that I went there and observed it the day of the incident. That day there was also a chair that was right next to the cart. And – but that's exactly the way the room looks today pretty much.

CLARK Could you have drawn that picture from memory?

HINDS No. It's my building, you know my floor plan, but I – I could not – I am just surprised of

RECORD

mistake then.

HINDS No. No, not true.

JUDGE Oh, okay.

CLAIMANT She – she was listed as an employer witness according to the people on the line when I called, so.

JUDGE Oh, okay. Well let's move on then to – Mr. Record, to your testimony, and then – and then we can go through any witnesses that you have.

Mr. Record, can you tell me what was the reason that you were given for your termination?

CLAIMANT I was told I created a hostile work environment, and for inappropriate behavior. That is the extent of what I was told. And I would like to add that Ms. Battista indicated in her testimony on Tuesday last week that in fact I was told roughly the summary that shows up in Exhibit – whatever it is where she summarizes, Exhibit 8. That was not true.

JUDGE Okay.

CLAIMANT Until Alana (phonetic) from the Department of Workforce Services told me, I had no understanding of the formal allegation from Ms. Hanson. That was on the 11th of March, 20 days after my separation.

JUDGE And did you not know why you were terminated – did you not understand why they stated you – it was for a hostile work environment, or inappropriate behavior?

CLAIMANT Well the hostile work environment – and I'm going to have trouble drafting (phonetic) this in a hurry. But my understanding of a hostile work environment is it typically has to do with discrimination, verbal or otherwise – let's see, discriminatorily harassed based on a protective class. That doesn't apply to me, that I know of at all. And I have two witnesses to corroborate that.

JUDGE And inappropriate behavior?

CLAIMANT And as far as inapprop (sic) – as far as inappropriate behavior. I do not think having a conversation in a dimly lit room was – would be considered inappropriate behavior when it was in fact an effort to maintain a low profile, which we had been asked to do. And when we have had a reasonable profile, which is to say working on CLPA in my office, or in her cubicle, after both of those instances there were issues brought to management. Not based on fact, but based on perception.

## RECORD

JUDGE And did you – did you meet with Ms. Tanner in this – in this file room on – on the – on the 19th –

CLAIMANT Yes.

JUDGE - of February?

CLAIMANT I did.

JUDGE And can you tell me why you met with Ms. Tanner on the 19th in the file room?

CLAIMANT My direct supervisor, Mr. Hunt, was out of the office. Ms. Jennifer Curtis, who is on our team, was extremely frustrated with a problem with Amogee renewals. And Ms. Ramiriz (phonetic) – and I actually went to Ms. Ramiriz's new supervisor, Ms. Carla Ball, and I offered to try to be part of a meeting to see if she wanted Carla, and Jen, and me, and Tim, to all get together.

Tim declined, but I was trying to understand from Emilie, who had actually developed the process of the renewals, in conjunction with Ms. Ramiriz, what it was that was a problem that Ms. Ramiriz was not grasping that kept coming back to Jen for support. So I chose to have the conversation with Emilie because she had been Tim's supervisor, and she was aware of the – the places where they kept having problems.

I was going downstairs to talk to Mr. Mather about a separate issue, and Ms. Tanner was planning on taking a break anyway. So that was a place where she apparently took some comfort from the – the noise if you will, and so I agreed to meet her there. And we started the conversation. Ms. Hanson came in, interrupted it. Then she left immediately. We resumed the conversation. I left and went to speak to Mr. Mather. And I think that's been documented by everybody about my behavior after exiting the file room.

As far as having the opportunity to have my office, my office was removed from me during a change in administration when Ms. Lance was – was on long term disability, at the moment was replaced by Mr. Matsen (phonetic.) When he moved up he wanted to reorganize all the people. So the office I'd had for about eight years was taken away from me.

JUDGE When did that happen?

CLAIMANT That happened in Jan – end of January I believe. My – my boss, Mr. Hunt, and his boss, Mr. Ratliff, coordinated with the dealer loan group to try to create an office for me out of what was a storage room upstairs. And I had to approve the final plans for that. I had moved things out of it. Mr. Hunt had been coordinated with dealers to make that possible. And the day before it was to be built to my specifications I learned that it was being given to Mr. John Lemon instead. So I had no office.

RECORD

CLAIMANT Okay, as I tried to explain earlier, in a technical environment working on CLPA, which has been documented repeatedly, when I met with her in my office in the first week of November on a couple of occasions that was brought to someone's attention that I was throwing sand in somebody's face, or I was being – I was not adhering to counsel to not speak with her, when actually I was doing work.

When we met in her cubicle to discuss CLPA, at the direction of her sup (sic) – then supervisor, Ms. Sherry Lance, there were complaints immediately following that. Immediately following that, as in less than 24 hours afterwards. In a retaliatory gesture.

So what we had been told was to keep – manage perception. So the only thing that we could think of to manage perception was to not be seen together. So the place is referred to as the unused file room, although apparently people do use it to plant things in there. it gets taken in and out. There's a wheelchair that I assume gets some use. The chair that wasn't in the aisle with me that day was claimed to have been in the aisle, and then it wasn't in the aisle. So – so there's obviously some activity there next to the mailroom, which was very active when we were there.

And it wasn't the sort of thing where I would set up a conference room, try to find one available. It was sort of an impulsive thing. I was already going down to see Mr. Mather. She was already going down to take a break. It wasn't meant to be a big thing.

JUDGE How did you know that she was going there for her break?

CLAIMANT When I contacted her about it. She said I'm going down and why don't we just meet.

JUDGE Is Emilie the correct – Ms. Tanner the right person to speak to regarding these issue – this issue with the –

CLAIMANT What I tried to suggest was she was the subject matter expert about Amogee renewals, so that's why I chose her. She understood the process as well as anyone.

JUDGE And can you tell me what happened when you went into the file room with her on the 19th?

CLAIMANT Yes. We met there and we were talking about Amogee renewals. And I learned that the issues were backdating, and they were also – the unpaid interest, which the loan officers were having challenges with – with their customers. So we had that discussion. And then at some point she mentioned her latest review as well. The conversation was interrupted by the arrival of Ms. Hanson. When we tried to leave, but Ms. Hanson quickly turned off the light and left so we talked for a couple of minutes more. Then I left and went to Mr. Mather's office.

JUDGE Was the light off when you were talking to Ms. Tanner?

RECORD

CLAIMANT Again, the security lights are always on, and the door is always open. So I – I think it – we differ in how we describe that, in terms of – of vision. But the security – the reason the security light is there is to make it so that it's secure, so there is light. The reason we didn't have the big lights on was because if we were trying to be in a low profile environment obviously putting on the big lights doesn't help us stay low profile.

As a unu (sic) – relatively unused space, having a quiet conversation there about business seemed acceptable. Obviously it was a lapse in judgment on my part. It should have created no risk to the company. It should have created no concern for anyone. And it's obviously been a complete disaster. But it's an isolated incident of poor judgment. Had Ms. Hanson not had a cold none of us would be on the phone today.

JUDGE And – and did you ever have your – your pants down in – in the file room?

CLAIMANT No.

JUDGE Did Ms. Tanner ever have any clothing removed?

CLAIMANT No. I would like to suggest a couple of things about Ms. Hanson's observations if I may at this point. Is this appropriate or not?

JUDGE All right.

CLAIMANT Many people referred to her as being quite ill, including herself. So she had a runny nose. I don't know if her eyes were running. I don't know if she were taking medication. I don't know if she had a fever. I have no idea about those things. But if you were to imagine that she's looking through all these shelves which had, as I tried to explain before, the shelves themselves create a horizontal block. There are also little stops on the shelves to keep things from sliding left and right, and I think forward and back. I know left and right.

So she didn't mention blind spots. She had – with eyes at 5' 2", roughly from the floor, would have difficulty seeing anything on the floor level, which would be the pants. The place where I was sitting was not the chair she originally stated, but was the cart. When I stood up from the cart, not a young person I would push off on both sides of me to get up. And that gesture could look like someone putting on their pants rather than me just standing up. And that would be my best guess, is that perhaps between the occlusion of the various things between her, and us, which she claimed to be 20 feet.

Her time there varied from the – in the doorway from turn the light on, turn it immediately off when she saw me, to 30 seconds. So it's hard to know really. But I'm guessing it was closer to three or four seconds. So as she watched me stand up it could appear that I was pulling up my pants. As far as a gesture.

## ADDENDUM E

### RECORD

JUDGE Okay. And – and when you – so you were sitting on the cart. Where was Ms. Tanner standing, or sitting?

CLAIMANT She was leaning against the shelves on the back wall. So I was facing west, she was facing north I guess.

JUDGE Did you – did you think that it – it could look bad, or inappropriate, to be in a darker room with – alone with Ms. Tanner?

CLAIMANT It did – it obviously didn't enter my thinking when we agreed to meet there. Your Honor. It would absolutely ridiculous for me to jeopardize a 14-year career of exceptional performance over having a conversation of that sort, even though I was trying to do company business.

JUDGE What was your relationship with Ms. Tanner, was it professional, or did you have a personal relationship with her?

CLAIMANT It was professional, and she had become my friend.

JUDGE And did you have any romantic involvement with her?

CLAIMANT No.

JUDGE Did – were you approached prior to this incident regarding your relationship, or friendship, with Ms. Tanner?

CLAIMANT Ms. Battista brought to my attention on September the 23rd I believe that I – that there had been an anonymous complaint, which she itemized to you on Tuesday had 15 bullets, one of which she indicated was that I wasn't able to meet in the mornings – or until 3:30, or something. Which is interesting because that never came up in the – in the comments Ms. Batista made.

On September 23rd she told me it was a formality. She was unfamiliar with how to handle it. The case was closed That I needed to manage perception. I don't think she actually stated that there was – there was an affair alleged, although that is written in her document, in the exhibits. I can't tell you the number off the top of my head, but I can find it.

JUDGE That - that's fine. And – and –

CLAIMANT Managing –

JUDGE - did she tell you how to manage perception?



RECORD

which is – what I keep hearing is that the incident in the file room, and the state of undress is the big thing. It's the – it's the only issue that could be considered a basis for terminating me. So if in fact I were naked in the room, as claimed by Ms. Hanson, I should have been terminated. I wasn't naked in the room so I don't think I should have been terminated.

Mr. Hinds said to me in his office on the 19th of February, "if it had only been a conversation I would not have brought you into my office." Now if that is a true statement, which it is, and I was only having a conversation with Ms. Tanner, then the whole question about my small business background, and trying to help out, and perhaps I wasn't in the line of command, isn't really germane to the discussion about whether I am – I was discharged without cause.

So I would like to bring Mr. Ratliff in, without anyone else, or with as few people as possible in the room, so that he can answer my questions comfortably, and honestly. And I can only hope that he hasn't been coached since the meeting on Tuesday last week.

JUDGE All right.

CLAIMANT 'Cause I believe, as Mr. Hinds wanted him to be the person that could corroborate the nature of the conversation, that his memory may be slightly different from Mr. Hinds'.

JUDGE Okay, well I – that's what it sounded like the reason – I mean based on the – the testimony that the reason you were brought in was due to a believed inappropriate contact – conduct with Ms. Tanner, and not just having a conversation.

CLAIMANT Well if it is misconduct, the only person who can truly say whether I had clothes on or not, or whether she had clothes on or not, would be Ms. Tanner. Because she was the person in the – in the vicinity that could actually see without any distortions. So I would be happy to have her called. I would still like to consider Mr. Ratliff, is in – if in fact the concern is greater than the alleged – I don't know what else to call it, naked behavior, or whatever.

JUDGE Okay. I think we should call Ms. Tanner, and we'll see from there if any –

CLAIMANT Okay. Thank you.

JUDGE - further – one moment. I'll place you on hold.

CLARK So is Mr. Ratliff to stay on, Your Honor, or not, as available?

CLAIMANT She's put us on hold I believe.

JUDGE All right, I now have Ms. Tanner on – on the phone as well. Ms. Tanner, let me place

LEGAL SECTION

JEFFREY S. RECORD

4694 Wallace Lane  
Salt Lake City, UT 84117-5552  
801-386-3311

RECORD

U.D.W.S.

11 June 2010

Workforce Appeals Board  
PO Box 45244  
Salt Lake City, UT 84145-0244  
801-526-9244 (facsimile)

Subject: Response to Case No. 10-B-00671 (Appeal of Case No: 10-A-04727)

Ladies/Gentlemen:

Thank you for your consideration. I'm hopeful that you, with the opportunity to read/review all of the documents, will be able to realize the lack of substantial evidence and note that, in reality, Zions (the company) rightful interests were not put at risk by my behavior. In truth, Ms. Hanson's misreporting jeopardized the company's interests by the loss of two valuable employees and considerable time and expense denying unemployment insurance.

I worked for Zions for just over 14 years with my performance acknowledged by Employee of the Year, Star Employee, Applauses and consistent 4+ ratings on a 5-point scale. During my tenure at Zions, none of my supervisors ever expressed concern about me behaving inappropriately or having relationships with anyone that was cause for concern. When I was terminated, I had accumulated approximately 113 days of unused sick leave. I was usually first in, last out and used security badges appropriately. I had an established pattern of following the rules and, in addition to my exemplary work performance and attendance record, I exceeded company expectations for professional attire and participated in Paint-a-thons, Bowl-a-thons, United Way Day and Junior Achievement. I was a "company man." (See Exhibit 20.)

In truth, I often held the corporation's interests too high. During the first week of November, I stayed in Salt Lake and took care of business (monthly special reports, rate changes, completed design of new primary collateral screen (CLPA) and "covered" for my boss) instead of going to my mother in New Hampshire where she was having surgery. Mr. Hunt, my direct supervisor, was scheduled out of town for a family vacation. Although he said that I could go, I elected to stay and provide the one-of-us coverage that we tried to maintain for Consumer Loan Servicing.

After being suspended on the 19<sup>th</sup> of February, I requested permission to complete the tasks that I'd committed to prior to being asked to leave the building. I did so remotely...completing the final effort around 10 o'clock that evening. These included resolving an issue for our affiliate California Bank & Trust for Mr. Jeff Mather, adjusting some accounts linked to U08, Loan Modifications and Troubled Debt Restructuring for Mr. Jim Ingles and removing ACLS access for one of Ms. Deborah Curtis's employees that was moving out of the department on the 19<sup>th</sup>.

It is unconscionable that two exemplary employees, both Assistant Vice Presidents, should be terminated and denied unemployment benefits based on a spurious allegation that they engaged in inappropriate behavior. Although the company's witnesses claimed to have investigated (Page 6, Line 40 - Page 7, Line 2; Page 7, Line 27 - 30; Page 31, Lines 15 - 22) the "incident," neither Ms. Tanner nor I was asked what transpired in the file room. Only Ms. Hanson's perspective was ever investigated. Of all the "evidence" presented by the company in its exhibits and via testimony concerning our behavior, only Ms. Hanson's testimony is direct and its significant point is untrue. What Ms. Hanson claimed to have seen was impossible because the described behavior did not occur. Interestingly, if it had, I do not think that Ms. Hanson could physically been able to see it. Her testimony, like so much of the information surrounding this denial of unemployment benefits, had a dynamic nature...and changed over time. Finally, the company certainly had other recourse besides termination.

I find it troubling that the Department of Workforce Services (DWS) was told things about the reasons for my separation from ZMSC that I had never been told by Zions. Based on my commitment to Zions and the quality of my work, I was stunned to learn that I was being terminated. It wasn't until some 20 days later that I learned of the alleged behavior...again, not from Zions, but from DWS. These particulars were critical to ZMSC management's decision to terminate me and, since I was unaware of them, impossible for me to address.

By the very nature of the exhibits and the "burden of proof" dictating that Zions went first in the hearing, the first impression given to the Administrative Law Judge is the one described by Zions. Via its exhibits and its team, Zions managed to create a virtual world that predisposed the Administrative Law Judge to perceive me as an often-counseled, insubordinate employee who routinely put the company's interests at risk. By creating that "up front," the plausibility of their claim of just cause fits nicely within that context. The foundation of that world, however, was not founded on fact, but rather on hearsay, rumor, inaccuracies or intentional falsehoods. The overall approach of the company was to say as many things as they could and hope some would stick. There are many errors of date/time, person, chain of command and material fact. Please see my Inaccuracies for some of that detail.

I am frustrated that both the adjudicator and the Administrative Law Judge gave credibility preference to Ms. Hanson. I had the highest-level access to the system I supported (ACLS), which had over 100,000 active loans from six affiliate banks on it at one time. I had remote access to the network as well as to ACLS. I had access to the building seven days a week, 24 hours a day. I also had similar access to the Servicing Building and Information Technology Operation Center Building. I also had had access to the Stonewater Building (Application Services) for quite some time. The potential harm to the Company, both directly and indirectly, by my physical and electronic access was astronomical. Granting me this access suggests a very high level of confidence in my overall integrity and my honesty.

I know very little of Ms. Hanson except that she was a collector and has been with the company less than ten years. Her ACLS access was that of a general collector and greatly restricted what modifications she could make to loan data. Having been counseled by the DWS literature to stick to the facts, I shied away from hearsay and conjecture, however, Ms. Hanson could have been motivated to put Ms. Tanner's job in jeopardy. Ms. Tanner's department and Ms. Hanson were not always in harmony. Ms. Hanson's cubicle mate had worked for Ms. Tanner and had apparently wanted to work there again. Ms. Tanner did not choose to rehire her. Without belaboring the point, some people do enjoy power, revenge and the limelight.

I cannot know at what point the ALJ decided to give credibility preference to Ms. Hanson's testimony, but, if my credibility were in question at all, it would certainly have been a more reflective hearing of reality if some of my requested documents had been made available and all of the witnesses I wished to call had been allowed/encouraged. If my words were not sufficient, then the documents and the witnesses could speak to the facts. The pre-hearing guidance was that if I said something under oath then it would be taken as fact. Clearly, that cannot hold if, as was the case with Ms. Hanson and me, our perceptions of the events are "off" and "on." This is also true concerning the discussion between Mr. Hinds and me.

I'm certain that the ALJ made some of her decisions regarding the necessity of witnesses based on an effort to expedite the hearing. Sadly, without them, and without her believing my facts, she failed to obtain the reasonably available, competent evidence necessary to resolve the issues in the case. The indicated "preponderance of the evidence" was neither substantive nor corroborated by first-hand experience. I do not understand why the ALJ chose to preclude the character, experiential or accuracy clarification that those witnesses could have provided.

I've tried to minimize this response, but I don't know how best to bring my innocence to light and I've gotten caught up in some detail. Please note Ms. Hanson's comments at the beginning of the transcript section (I did stop myself from going through the whole document.). The inconsistencies of her testimony should be noted. There are three pieces to my answer:

1. Procedural Issues
2. Legal Issues
3. Inaccuracies (subset)

Again, thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "J S Record", with a stylized, cursive-like script.

Jeffrey S. Record

## Procedural Issues

RECORD

There were shortcomings in the way the telephone appeal hearing was handled. Clearly, I am neither comfortable nor well-versed in the legalistic setting. Although the Administrative Law Judge (ALJ) indicated the general outline of the course of the hearing at the beginning, various elements did not proceed in a claimant-friendly manner.

I find it odd that a hearing designed to ferret out the truth would allow Zions to have in one room, a Human Resources representative who was also a witness, a hired professional coach/interrogator and a witness at the same time. The company's team was against an individual employee or individual witness. In addition to the lack of awareness of who's actually in the room, the opportunity to coach a witness (in this case by Clark and/or Battista...who were aware of the prior testimony) is significant...and all beyond the view of either the Administrative Law Judge or the claimant. Those of us who don't spend time in a court-like setting find the whole process unsettling. I had requested the exclusionary rule be enforced, and in the first meeting of the hearing, I understood that only Mr. Clark and Ms. Battista would be present during my testimony. This becomes quite obvious when Mr. Hinds, whom I didn't know was in the room, began asking me questions. I was flabbergasted. I understood that only Mr. Clark and Ms. Battista were on the phone.

1. The order of the evidence and exhibits was not chronological and the testimony bounced around. It made it difficult to follow the flow and to make sense of the evidence. This may have resulted, at least in part, because the exhibits were not provided in a reasonable order. A chronological presentation would better have served the development of the arguments and would have better explained my compliance with the September request. After the conversation with Ms. Battista in September, my behavior did change (note Mr. Hunt's testimony, Page 67, Line 39 - Page 68, Line 3 and Ms. Tanner's testimony, Page 61, Lines 17 - 37). Ms. Fuller could have confirmed this as well had I been allowed to call her as a witness.
2. I was not supported in my effort to get documents prior to the hearing based on the ALJ's assertion that the "burden of proof" was the company's responsibility. Since, at some point, the ALJ discounted my credibility, my words alone were not sufficient to plead my cause. The following documents that I had requested before the hearing would have been very helpful to my arguments. Some of the documents would have confirmed the work that I was doing with Ms. Tanner (2 (I did procure a copy, Exhibit 20), 3 and 4)); some would have been clarifying (1, "formal counseling and written probation" didn't happen), my performance evaluations would have noted any behavioral issues had there been any and it would have confirmed my consistent excellent work (5) and my corporate mentality would be shown by my work after I was suspended (8).
  1. Document of formal counseling and written probation.
  2. Copy of Mr. Ratliff's e-mail to Mr. Hinds following my interview with Mr. Ratliff and Mr. Hunt on 13 NOV 2009.
  3. Jeffrey Record's e-mail to Ms. Teresa Smith on 06 NOV 2009 and its attachments (CLPA screen).
  4. A sample image of a production CLPA screen if the modified one has not yet been promoted to production.
  5. Jeffrey Record's performance evaluations beginning in the year 2002.
  6. Documentation supporting Jeffrey Record's Employee of the Year (2004).
  7. Copy of Mr. Ratliff's e-mail to his group about Jeffrey Record following his separation from ZMSC.
  8. Copy of Mr. Jeff Mather's last e-mail (should include that day's exchanges showing solution to CB&T issue) to Jeff Record Friday, 19 February 2010.
3. Zions and its representative tried to keep me from calling any of my witnesses (Page 29, Line 10 - Page 30 Line 11) saying they weren't necessary and the ALJ discouraged me from calling Mr. Ratliff (Page 37, Line 27 - Page 38 Line 12; Page 44, Line 29 - Page 45, Line 25), Ms. Fuller and Ms. Browning (Page 64, Line 27 - Page 65 Line 38). She also didn't encourage my full

examination of Mr. Hunt after she had obtained the information she wanted. She kept directing me away from what I thought was germane and telling me my witnesses weren't necessary. The lack of these witnesses, in light of the credibility decision, rendered my arguments less effective. I do not understand why the ALJ's thinking precluded the character, experiential or accuracy clarification that those witnesses could have provided.

4. I never felt that I was provided an opportunity for an A-Z presentation of my explanation. Each time that I wanted to refute misinformation or make a statement, I was reminded that I needed to wait until my testimony. There was such a volume of material, it was difficult to keep track of the errors and, trying not to repeat things, made my prepared efforts hard to use.
5. Although the ALJ did a good job of keeping me in line, she did not quickly control interruptions of testimony and/or disruptive individuals at the hearing. From the ALJ's comments on Tuesday, I didn't understand that anyone additional would be privy to my testimony besides Mr. Clark and Ms. Battista. I was floored to find that Mr. Hinds was present and asking me questions. The ALJ did not act aggressively enough to curb his disruption. Mr. Hinds interrupted my testimony (Page 53, Line 40 - Page 54, Line 30 and again Page 56, Line 23 - Page 57, Line 27) repeatedly and disrupted my focus.
6. Facts necessary to resolve the issues and support the conclusions of the law were not found or at least not substantiated by direct testimony. Where there were discrepancies, the ALJ did not seek clarification via documentation (Microsoft Outlook could have confirmed any meetings; my requested documents) or the use of additional witnesses (Mr. Ratliff, Ms. Fuller, Ms. Browning...and Mr. Hunt more fully). A phenomenal amount of claims were made, but none (with the exception of Ms. Hanson's) were other than hearsay and none were documented with times or dates. I had no closed-door meetings alone with Ms. Tanner and yet Ms. Battista claimed that my management said that we continued to meet behind closed doors. My immediate supervisor, Mr. Cordon D. Hunt, had his office adjacent to mine and testified that he never saw us meet behind closed doors (Page 68, Lines 35 - 41). Another witness, Ms. Joyce Fuller, could easily have stated the same. I was discouraged from having her testify...because it was "unnecessary."

I was surprised at how many errors there were in the Company's exhibits and retelling of the events. I tried to highlight some of the more egregious ones when questioning the witnesses, but, without the ability to have a corroborating witness, some of the errors result in a "he said" "he said" presentation. Mr. Hinds said in his oral testimony (Page 31, Lines 27 - 30) that Mr. Ratliff was present so that he could "validate the conversation that I had with Mr. Record" on the 19<sup>th</sup> of February. As I stated clearly to the ALJ, Mr. Hinds and I differed in our memories of the discussion and Mr. Ratliff was the only source to confirm the nature and specifics of our meeting. The ALJ indicated it wasn't necessary, but these could have been substantiated had I been allowed to have Mr. Ratliff as a witness. The following are pivotal to the interpretation of the justness of my termination:

1. When I met Mr. Hinds, EVP in his office, his first question was something like "Do you know why I've called you into my office?"  
I answered "No," since I had no idea why he would have wanted to meet with me at that time unless he wanted to discuss the possibilities of a new office for me or if he'd learned of my inquiry about the requirements for becoming a vice president. Neither of those was appropriate for me to bring up first. Mr. Hinds indicated that I said, "if it was regards to a meeting you had with Emilie Tanner in a file room then you did." I did not say that.
2. When I informed Mr. Hinds that it had only been a conversation, he said something meaning "I would not have brought you into my office if it had only been a conversation." When I asked him about that during his testimony, he denied saying that.

I did not know why he brought me into his office and, most importantly, since the time in the file room with Ms. Tanner was spent discussing Amegy renewals and Ms. Tanner's recent review, then there was no reason for me to be in his office and no reason for me to be terminated. RECORD

With respect to Ms. Hanson's testimony, it is a "she said" "he said" followed by Ms. Tanner's "she said." Ms. Linardarkis, the head of HR said that one could not be fired on the basis of speculation. Obviously, that is not true since Ms. Hanson did not see what she claims and the conjecture of Mr. Clark is unfounded and leading (Page 70, Lines 27 - 29).

On no occasion was I asked to sign anything to suggest that I understood specific expectations or guidelines of my behavior. Ms. Battista's understanding of my chain of command was incorrect and my managers did not express discomfort about my visits to the hospital. In fact, my immediate supervisor often inquired about Ms. Lance, knowing that I was seeing her often.

It's odd that Ms. Tanner and I were assumed guilty and were required to prove our innocence. On the one hand, we're told that we just need to state something and it is considered fact. I was denied both documents and witnesses to substantiate my behavioral character. Mr. Clark of Employers Advocates LLC, was happy to stipulate that my work was beyond reproach (Page 29, Line 10).

When my boss, Mr. Hunt, was called by the ALJ to testify, he was anticipating questions about my character and my behavioral changes following the conversation in September with Ms. Battista. At this point in the hearing, the ALJ had joined the flopped "prosecution" and was interested in whether or not I should have been speaking to Ms. Tanner about Amegy renewals. This is a very odd turn of events (read Mr. Hinds testimony, Page 43, Lines 5, 38 - 40 and Page 44, Lines 23 - 25). Mr. Hinds had stated very vehemently that he was not at all interested in the content of the conversation in the file room. In the end, he, speaking very much out of protocol, was badgering me about my role in the company, claiming that the content of my discussion with Ms. Tanner was none of my business.

I'm appending three pages of an e-mail that reference Mr. Hinds, Ms. Lance, Mr. Hunt, Ms. Tanner and me...that discuss Amegy renewals. (This new evidence did not seem germane prior to the hearing; it is the odd attack by Mr. Clark and Mr. Hinds that encourages me to provide it now.) It is true that I was involved with the process and Mr. Hunt could have known of Ms. Tanner's involvement. Coming into the middle of the discussion, Mr. Hunt's thoughts about Amegy and me were relative to a data file that I was preparing for them. He didn't think about the renewal process as something I would have been involved in...typically, Ms. Curtis had been taking care of the renewals. His response was accurate within his perceptual set, but, again, I worked on many issues independently of Mr. Hunt.

I was surprised to learn that Mr. Clark, the hired consultant, claimed to know what my job entailed. Mr. Hinds is EVP to approximately 300 people. He does not know what each of us is expected to do by our supervisors. Although many of the functions in the building have clear production values, I was a professional, paid not to be micro-managed, but to insure that Consumer Loan Servicing and our affiliate bank customers received the support they needed. I was expected to react to situations, both technical and related to customer service, with my own assessment. As noted in Mr. Hunt's testimony, he recalled the data file that I was working on for Amegy Bank, but neglected to remember that Ms. Tanner had created the original Amegy renewal process and that she was a reasonable subject matter expert. He and I worked independently and together.

**Legal Issues** (expanded from my 19 May 2010 Appeal Letter)

Finally, “the rules pertaining to Section 35-4-405(2)(a) which are essential for a determination of ineligibility under the definition of just cause” were not proved during the hearing. RECORD

- **Culpability:** I did nothing that was “so serious that continuing the employment relationship would jeopardize the employer’s rightful interests...” In fact, my conversation in the file room was intended to resolve a business issue. I had a business discussion with a Subject Matter Expert. None of my behavior after the September conversation with Ms. Battista could possibly be construed as jeopardizing the employer or any of its customers. The ALJ did not establish what harm I ever caused the company never mind that a continued employment relationship would jeopardize the employer’s rightful interests.

Let’s see...a ten-minute window of opportunity. Talk about remarkable syzygy: Ms. Curtis had to be upset about Amegy Renewals and let me know, I was going to speak to Mr. Mather downstairs about an issue, Ms. Tanner was going to be on break in the file room, Ms. Hanson had to be sick, need to blow her nose, choose the file room, hear one of us brush against the metal shelving, turn on the additional lights and imagine something that wasn’t true...and then choose to report it. Options:

1. terminate two Assistant Vice Presidents with a combined 31 years of exemplary experience without investigating their description of the events that transpired; or
2. inquire of each of the AVPs what happened and then request that they meet elsewhere for business discussions.

The ALJ indicated that I met in a dark room with Ms. Tanner and was engaged in inappropriate conduct. That is not true. In addition to the fact that the room was lit, the interaction in that room was appropriate and professional. The meeting location, a place where Ms. Tanner went to find calm (hence the low light setting...please recall that she was allowing me to ask technical questions during her break), was out of the way sufficiently that it was unanticipated that anyone’s perception would be involved.

In truth, no inappropriate behavior occurred during the alleged incident on 19 FEB 2010, nor were either Ms. Tanner or I in a state of undress. For argument’s sake, however, let’s assume that we were half-clothed. The company certainly could have insured that an isolated incident would not have been repeated without discharging us. I had no established pattern of violating company rules and, in addition to my exemplary work performance and attendance record, I exceeded company expectations for professional attire and participated in Paint-a-thons, Bowl-a-thons, United Way Day and Junior Achievement. I was a “company man.” (See Exhibit 20.)

- **Knowledge:** I knew that the company expected me to provide support for Consumer Loan Servicing and that remained my primary intent and focus which is what I was doing by trying to understand the issue that was causing a member of my team so much frustration. That is why I sought Ms. Tanner’s explanation of the recurring difficulty with Ms. Ramirez’s understanding of Amegy renewals. With permission, I continued to work remotely into the evening the day that I was suspended (19 FEB 2010) to insure that my commitments to internal customers were met. As requested by Mr. Ratliff, I also worked prior to my termination on the 22<sup>nd</sup> of February.

I had been told approximately five months earlier to try to manage perception. It is difficult to manage perception if it is agenda-driven and specific directives are not provided. Ms. Tanner and I did everything we could to continue to work and to control perception. Ms. Battista indicated during her testimony that she had not spoken with me since the 10<sup>th</sup> of November. Actually, she had not communicated with me since early October, which suggests quite powerfully that Ms. Tanner and I had been successful. The ALJ did not establish that I had not complied with the request to try to manage perception.



Knowing that reasonably or not, someone was concerned about my friendship with Ms. Tanner, we chose to eliminate anything that could be perceived as creating discomfort. The restrictions on our friendship were over-the-top in an effort to protect the company. Our decision to meet in the little-used storeroom was in an effort to minimize the likelihood of making anyone uncomfortable.

All assertions about Ms. Tanner and me being together for non-business reasons or behind closed doors were untrue and hearsay; Mr. Clark, Ms. Battista and Mr. Hinds witnessed no behavior...period. The anonymous hotline allegations did not indicate any specific behaviors that created the discomfort to the complainant. The comments about my ability to meet in the morning were untrue and I don't think they were shared with me until the DWS hearing. Ms. Hanson's allegations were false except for the fact that we were in the file room.

The guidelines that I had been given in September were to try to manage perception. Having been accused of ignoring that counsel when meeting with Ms. Tanner about technical issues in her cubicle setting on one occasion and in my office on multiple occasions (first week of November, Exhibit 20), choosing a more remote setting seemed reasonable. How I could anticipate that Ms. Hanson would need to blow her nose, choose to go to a relatively unused file room, hear one of us brush against the metal shelving, flip on another light and then imagine that she saw us in a state of undress is beyond my grasp.

If discussions about technical issues such as the development of a customized screen were presumed to be of a personal nature, how could I control someone who claims to have seen me naked when I was wearing a long-sleeved shirt and jeans that covered me completely? In Ms. Hanson's testimony, she indicated in thirty seconds that she had virtually unobstructed view (later "blank spots where you can't see" Page 25, Lines 35 - 36) through multiple sets of shelves with supporting brackets and stops, and she claims to have seen only part of the exposed flesh of my leg. She apparently could see nothing of Ms. Tanner who was standing facing her. She claimed ("seemed to me like") that we each pulled up our pants. Exploring the "didn't happen" further, why would we, as she claimed, sit with our pants down...at ninety degrees?

The ALJ asserted that I was told that I was not changing my behavior towards my relationship with Ms. Tanner on November 10, 2009. That is not true. Ms. Battista did not have a follow-up meeting with me then. I was not told anything by anyone on November 10<sup>th</sup> regarding my relationship with Ms. Tanner. I did meet with my boss, Mr. Hunt, and his boss, Mr. Ratliff on November 13<sup>th</sup> and reviewed the allegations that had been presented to them. Exhibit 20 includes Mr. Ratliff's explanation of the misunderstandings and explains all of that away. I was not engaging in personal interaction with Ms. Tanner during work time. I was complying with the September requests. Please note Mr. Hunt's assertions in his testimony (Page 67, Line 30 - Page 69, Line 91). His office was adjacent to mine (up until mine was taken from me during the reorganization of Consumer Loan Servicing (approximately end of January 2010)). Had I been allowed to call Ms. Fuller as a witness, she could also have corroborated the change in our behavior and the fact that we did not meet behind closed doors.

- Control: I could have chosen not to meet Ms. Tanner, but I had no control over Ms. Hanson's, choice, timing or perception. What she claims to have seen did not exist, so I can only speculate that her illness or some underlying motivation from within or without made her report what she did in Exhibit 12. Theoretically, Ms. Tanner and I could have chosen a different venue. Our post-September history, however, suggested that typical venues were misperceived or at least misrepresented to others.

The ALJ asserted that I could not have met with Ms. Tanner and engaged in inappropriate conduct. I did meet with her in an effort to understand the problem between Ms. Ramirez and my ~~transcriber~~ <sup>RECORD</sup> ("keeping his head down and getting his work done."). I did not engage in inappropriate conduct as stated under oath by Ms. Tanner and me. The choice of venue was an isolated error in judgment and, quite obviously, I did not anticipate the negative effect of it.

Inaccuracies

RECORD

Exhibits

Exhibit 7:

Clmt was discharged for gross misconduct—inappropriate conduct on co. property. See attached 4 pages.

There's no reference to gross misconduct except in this exhibit. It was not used as the indicated reason for my termination...at the time my termination was executed, in Exhibit 8 by reference to Mr. Scott Carpenter, or during any testimony.

Exhibit 8:

"at approximately 10:30 AM"

differs from Exhibit 12 which indicates "approximately 9:45am"

"dark back room"

Open door, security lights are always on.

"see two people scrambling to put on their clothes."

Differs from Exhibit 12, which states "saw 2 people with their clothes half off in the back corner of the room." Emilie and I were fully clothed and did not scramble to put on clothes that were not off.

"The co worker went to speak with David Hinds, EVP RLC and report the incident."

Differs from Exhibit 12, which states "I then went and reported it to my supervisor Brandy DeHerrera."

"asked them if "being in a dark room without the lights with a co worker in his RLC was acceptable behavior." They both admitted it was not appropriate behavior."

The security lights were on and neither of us admitted it was in appropriate behavior. We indicated that it might be perceived as such...only after repeated badgering...and tried to put the choice of venue in context with the prior technical meetings we had had. We were not allowed to explain.

"He told them the company had spent considerable time and money in addition to formal counseling and written probation regarding their consistent inappropriate behavior with each other on company time."

Formal counseling typically involves written signed statements with contingencies...if you do this, then that...or if you don't do this, then that. Neither of us received anything of the kind. Additionally, there was no written probation of either of us. Ms. Battista, who scribed this MEMO, and as the HR Business Partner would have a written document in our files, and Mr. Hinds who made the assertion...disavowed that we were ever on probation during testimony.

"He was then escorted by David Ratliff, his direct supervisor."

My direct supervisor is Mr. Cordon Hunt. Again, this level of inaccuracy puts any of their data in question. Ms. Battista has access to the organization chart and would think she should know the chain of command when describing it.

Exhibit 9:

I did not say "they will not return my calls." I likely indicated that Ms Battista had not provided me with ANY specifics when she executed my termination.

The ONLY behavior I admitted to was having a conversation. I did not agree to engaging in "inappropriate behavior on company property." I had participated in a business discussion.

The significant piece of the conversation with Ms. Linardakis was that she said no one would be let go on the basis of speculation and that my termination had been the result of a single incident.

Exhibit 10:

Subject: Follow up to discussions with Emilee Tanner and Jeff Record

Spoke with both Brent Marriott (works in finance ½ mile away...NO relationship to the work of either Ms. Tanner or me) (acting Manager of CLS) and David Hinds (EVP RLC) regarding the continued relationship between Emilee and Jeff while at work.

Both Emilee and Jeff went to the hospital together to see Shari (sic) Lance. Emilee took a vacation day, Jeff was absent from work.

The only day this could have been was October 25th, 2009. This would be the day after Ms. Lance's diagnosis of Creutzfeldt-Jakob disease (explained as a terminal condition). I had been notified by Ms. Lance's husband at approximately 8:00 p.m. on the 24<sup>th</sup> (three hours after the family had learned)...and, having been invited, arrived at Intermountain Medical Center (IMC) to see Ms. Lance at approximately 9:15 p.m. that evening.

October 25<sup>th</sup> was a Sunday. I regularly visited Ms. Lance, but I don't know that I ever was absent from work to see her. If I did on one occasion, it was no more than the equivalent of a lunch break...something I seldom took.

Ms. Tanner and I did not go together. We did visit Ms. Lance at the same time. Mr. Merrill Riggs and his wife Michelle did arrive in their Sunday clothes after Ms. Tanner, Ms. Lance, her husband, her daughter and I had been visiting for a while. In the "just a formality" counseling that I received in September by Ms. Battista (HR VP), I was told that "they" didn't care what Ms. Tanner and I did on our own time. Although I occasionally did work on Sundays for special upgrades or situations, I was not absent from work. Ms. Tanner worked Monday through Fridays and would not have required a vacation day to see Ms. Lance. The IMC does not fall under the jurisdiction of Zions Bancorporation...nor does the personal time of Ms. Tanner or me.

David Hinds received calls from the affiliates with personal information regarding Shari's health. He expressed concern for both of these employees who appear to communicate freely about Shari's illness.

This is a completely unsubstantiated comment with no clarity...and NOTHING linking either Ms. Tanner or me to anything. Ms. Tanner and I were, and remain, concerned about the health of our friend. At no time did either of us make comments about Ms. Lance in a way that could be construed as demeaning or inappropriate. The only awkward sharing that I was aware of came to me from Mr. Merrill Riggs when he described Ms. Lance's behavior in the California hospital. His comments seemed unkind and at her expense.

Brent (???) reported that both Emilee and Jeff continue to meet behind closed doors. Jeff has been seen on this cell phone excessively which Brent (???) determines as personal calls.

To the best of my knowledge, Emilee and I never met alone behind a closed door. The only closed-door meeting I recall with Ms. Tanner also included Ms. Joyce Fuller and it was because we were discussing our concerns for Ms. Lance.

RECORD

did not report to Mr. Riggs and my use of my cell phone is explained in Exhibit 20. I chose not to be with my then 88-year-old mother during and immediately following her hip surgery in an effort to protect the company's interests since my immediate supervisor, Mr. Cordon D. Hunt, was vacationing with his family during the first week of November. Although given the okay to go, our agreement with Consumer Loan Servicing was that one of us would always be present to support the department...this had to do with access issues to the system as well as general support. I chose to be the "corporate" man. I used my cell phone to communicate with medical personnel and my sisters in and around her surgery rather than incurring long-distance charges for the company (she resides in New Hampshire). Additionally, my car had been hit in my driveway early on the morning of 01 NOV 2009 by an off-duty police officer. My contact phone had been my cell for the investigators and officers. My wife and children use my cell phone as a means of indicating schedule or transportation issues. Finally, as indicated previously, I was not in the habit of taking a lunch...and was typically first in, last-out. On most days, I could have spent two hours on the phone without jeopardizing the company's rightful interests.

We continue to believe that both employees have not made necessary changes in their working relationship and appear to dismiss our directives.

This is completely spurious. As noted by my direct supervisor's testimony, that of Ms. Tanner and my own. We dramatically modified our working relationship and held ourselves to a standard that no one else did. We no longer visited about non-work issues and ceased to eat the occasional breakfast in the company cafeteria. Mr. Marriott (read Riggs) assertion is unfounded. He actually approved the final version of the CLPA screen..., which I brought to him with changes from Ms. Tanner. He was well aware of my development of the revised screen and its importance to Ms. Tanner and her group.

David Hinds writes, "I talked to Dave Ratliff this morning and asked him to have a very serious conversation with Jeff Record. Jeff will not be back into the office until Thursday so he will do it then."

Exhibit 20 is the explanation of the hour-long interview with Mr. Ratliff and my immediate supervisor, Mr. Cordon Hunt.

"I feel that Jeff and Emily (sic) are kicking sand in our face (sic) and being very insubordinate in disregarding the counsel they have been given. The resolution was put in their court and they have chosen not to act."

This, too, is absurd and spurious. We more than heeded the vague "manage perceptions." There were no formal directives, nothing was written to us, nothing was signed, there were no "if you do this, your job will be at risk" nor "if you don't do this, your job will be at risk" statements...which would be supportive of the alleged formal counseling. In spite of those absences, we maintained a professional demeanor and avoided any social conversations...although the building standards for everyone else would say they would be routine and expected.

#### Exhibit 11:

1. Complaint received through the company hotline alleging that Emilee Tanner, Lending Supervisor is having an affair with co worker Jeff Record, Landing (sic) systems administrator.
2. Met with each employee individually to discuss (sic) the nature of the complaint. Both employees disputed the allegation.

It wasn't until Ms. Battista's testimony that I learned any of the specific allegations. The bulleted items referenced in her testimony included alleged cheating on my wife and an alleged unwillingness to attend

meetings prior to 3:30 p.m. When Ms. Batista was asked for documented instances or specifics of the alleged cheating, she had no examples. Interestingly, if one were really concerned about the company's rightful interests, I would think my alleged unwillingness to attend meetings should have been brought to my attention. How much more important than spurious allegations of infidelity. If a physical relationship were taking place on the premises, that would be something to be concerned about, however, infidelity, in and of itself, should have no bearing on my work performance. Additionally, it would be easy to prove that I regularly attended meetings in the mornings (via accepted appointments in Microsoft Outlook). My immediate supervisor and his supervisor, our IT support and our team met for a weekly prioritization meeting every Monday morning. It was scheduled from 10:00 a.m. until 11:30.

**Transcript of Hearing**

RECORD

Page 25, Lines 17 - 18: "Well from what I saw - well it seemed to me like you pulled your pants up as soon as I walked in, and Emilie did the same."

Page 25, Lines 20 - 22: "flesh of your leg"

Page 25, Lines 35 - 36: "I mean of course there are blank spots where you can't see, but -"

Page 27, Lines 21 - 22: "I saw your naked legs, which obviously says that your pants were off, or down around your legs."

The testimony from Ms. Hanson changed from "heard something" that sounded like someone putting on clothes (Adjudicator to me on 11 MAR) to half-clothed to my naked leg to my naked legs. This is from a woman who was "sick that week." We don't know if she were medicated, sleeping well, eyes were running...or anything. She claims to have seen through a number of shelves and other obstructions two people clearly...who were half-clothed...but she could only recall seeing part of my naked leg which is odd enough since I was wearing jeans and a long-sleeved shirt. First she had me sitting on a chair...then she had me maybe sitting on the cart. She states there was a chair, too. (It was not in that aisle when I was there.) She claims to have been there for thirty seconds. I would imagine with an unobstructed view she could have seen much more...of me and of Ms. Tanner...and noted exactly what we were wearing...since we were not undressed. I stood up from the cart and moved to the end of the shelving to allow whoever had turned on the lights comfortable access to the room. In those seconds, Ms. Hanson had already left.

Her vantage point...to confirm who we were...again...odd since she had 30 seconds to make the assessment...actually gave her no true confirmation. Either of us could have come from the bankcard operations area, another storage room, the file room in question or the mail room. She also indicated that one had to go through the mail room to get to the file room. That is untrue: both rooms are off the hallway.

Page 1, Lines 12 - 16: The documents I requested have not become part of the exhibits...nor were they discussed by the ALJ. During a pre-hearing discussion when I asked for help subpoenaing them, the ALJ indicated they were not necessary...that the burden of proof rested with the corporation. Since neither the corporation nor its representatives proved anything, I would like to have the documents reconsidered.

Page 2, Lines 43 - 44: Unfamiliar with the proceeding, I never felt that the opportunity to present my narrative was allowed. When asking question of the witnesses, I was reminded that I could not present information until my testimony. I do not feel that I was ever given the opportunity to present an A-Z interpretation of the events leading up to my termination...nor the opportunity to underline the lies that were presented by the company.

Page 3, Lines 05 - 06: The timing for the closing statement was extremely restricted. Again, the pre-hearing caution that one not address issues that had already been brought up, combined with the minute or so remaining before the hearing would end, made that opportunity very difficult for me.

Page 4, Lines 10 - 13: The indication that the note was created on the 19<sup>th</sup> is one that may be of some significance. I asked Ms. Hanson when she created it, however, since it appears to be the document upon which the case rests. It's interesting to note that the adjudicator, Ms. Alana Boscan, was provided all of the other exhibits on the 10<sup>th</sup> of March. This one was faxed on the 11<sup>th</sup> of March...after the adjudicator was promised documentation of significant events by Ms. Darlene Draney of Employer Advocates from Ms. Boscan's Comment Created 03/11/10 @ 12:10 PM (Exhibit 15): "Darlene empl advoc: will get witness statements of the final incident or past behaviors that were seen as inappropriate between the clmt and Emilee." I am assuming

that the "statement" was created on the March 11<sup>th</sup>...not the testified date by Ms. Hanson. Since most business correspondence in ZMSC is created within Microsoft Outlook, it is also very interesting that no surrounding information that would confirm creation date or addressee is indicated. Additionally, there is a migration of the accusation from "heard the sound of people putting on clothes" to "clothes half off in the back corner of the room on a chair."

Page 6, Lines 13 - 15: The variations in the times are considerable...as well as the later indications of who spoke to whom...and when. I note this because the things that are could be matters of fact are neither consistent nor well-documented.

Page 6, Lines 28 - 29: "And she observed the two employees putting clothes back on." This is impossible and varies rather significantly from the original comment of "hearing the sound of people putting on clothes." Additionally, for the 30 seconds Ms. Hanson claims to have been there, she misidentified my pants, mentioned a chair that wasn't there, only claimed to have seen part of my naked leg (which was always covered in denim), couldn't describe my clothing (although she had full view of me and my attire when I walked past her to consult with Mr. Mather) and mentioned no other exposed parts.

Page 6, Lines 31 - 33: The order of the "telephone" game varies considerably throughout the testimonies. This one claims Ms. Hanson to Ms. DeHerrera to Mr. Hinds.

Page 6, Lines 37 - 38: "give us the appropriate time to—to look into everything." This description, as with the one immediately following referring to investigation (Page 6, Line 40 - Page 7, Line 02), gives the impression that Ms. Tanner and I were asked what transpired during our meeting in the file room. Actually, neither of us was asked what happened...and when I tried, on February 19<sup>th</sup>, to explain to Mr. Hinds (Executive Vice President), he was not interested and stopped me from explaining.

Page 7, Lines 24 - 25: In this recounting (by the same witness), Ms. Hanson and Ms. DeHerrera went to speak with Mr. Hinds.

Page 7, Lines 27 - 30: Again, the impression is given that I was asked about the incident. The intriguing thing is that no one wanted to know. Perhaps more intriguing is that what Ms. Hanson eventually alleges in her statement is never told to me by anyone at Zions. This disparity of understanding made my exchanges with Mr. Hinds very difficult. He was expecting me to own up to an egregious event that did not take place and so I couldn't own it...and I was dumbfounded why my conversation with a co-worker about Amegy Bank renewals and her appraisal should be creating such hostility.

Page 7, Lines 35 - 37: Ms. Battista's presentation to Zions legal counsel was "information, as I knew it as of Friday." She never asked me what had happened. When I tried to discuss it with her when she terminated me, she would not hear me out...although I did manage to say something like "nothing happened in the file room." She responded that she didn't care and that I would be escorted to my desk and was to get my belongings and leave the building. It's interesting that I was "proven" guilty without ever hearing my explanation or, for that matter, an explanation by my coworker.

Page 8, Lines 09 - 16: There is a very interesting distinction that the ALJ makes in her questioning of Ms. Battista. It's incidental, but it's extremely important. Neither Ms. Tanner or I ever admitted to "the incident as Ms. Hanson saw it." We were never told by anyone at Zions (not Mr. Hinds on the 19<sup>th</sup> nor Ms. Battista on the 22<sup>nd</sup>) what Ms. Hanson alleged she saw. I admitted to having had a conversation with Ms. Tanner. I was not allowed to even share the content of the discussion...but was cut off by both individuals. It is so easy to get lost in all of this, but neither Ms. Tanner nor I were in any state of undress, nor were we engaged in any inappropriate behavior. Finally, discussing Amegy Bank renewals and Ms. Tanner's review is far from putting "the company's rightful interests at risk."



Page 8, Line 18 – Page 9, Line 3: Throughout Ms. Battista's testimony, there is a lot of ~~perception~~ **RECORD** of the language used in the extremely brief termination explanation. I don't think she once indicated that my behavior was inappropriate nor that it was creating a hostile work environment. No specific actions were disclosed that were the basis for the complaint and there was not a reference to two or three employees also stating that they had concerns. In reality, the comments from Ms. Battista in September went approximately: I was hired as a recruiter, but my job has expanded to include the work previously done by three people. I really don't know how to handle this...it's new to me. I have an obligation to discuss this with you because it was filed. It's a formality. (After indicating that my friendship caused an unknown individual discomfort...and that I should try to manage perception.) I won't share it with your supervisor. The case is closed.

I think it's interesting that she refers to it as formal counseling. There was nothing presented to me in writing, nothing for me to sign, no conditional clauses (If you do this, then --- or If you don't do this, then ---).

Page 9, Lines 17 – 27: There is some obvious confusion on the part of Ms. Battista and some of it undoubtedly comes from her then relatively new function as the Retail Loan Center's HR Business Partner and some of it comes from blending my case with that of Ms. Tanner's. First of all, Ms. Battista did not meet with me at all in November. Exhibit 10 is dated November 10,, (sic) 2009 with her initialing the document DAB 11/14/09. Explaining the exhibit to the ALJ, she says that she followed up with both of us. It is not a follow up to me if she doesn't communicate with me. When she refers to "their managers," there is an inherent problem. My reporting line was from me to Mr. Cordon Hunt to Mr. David Ratliff and then to Mr. David Hinds. Ms. Tanner's was Ms. Tanner, Ms. Sheri Lance and then Mr. Hinds. Due to Ms. Lance's illness, there was an acting manager...indicated in this exhibit as Brent Marriott (Mr. Marriott works approximately half a mile away from the Retail Loan Center and is involved in finance I think).

We were not told we couldn't be together in September, but to try to manage perception. I think one needs to understand that we weren't doing anything out of the ordinary. There was definitely an agenda on the part of an anonymous individual...and, quite frankly, I think I was collateral damage. If one is living in a rumor-generated world, it is impossible to manage perception completely. So...it's interesting that Ms. Battista said she didn't tell us what to do in September...but now claims that "there was this being together, and they were asked to kind of, you know, stay apart unless it was a business reason. But they had been observed together."

I was not told to stay apart by anyone. We had, however, done our very best to manage perception and had abandoned the togetherness that everyone else in the building enjoyed. Our occasional crossing in the hall's would have been incidental to a business day. Our "togetherness" was work-related after Ms. Battista's remarks in September.

When Ms. Battista states "so I had a – a last conversation. I had not talked, at that time, to Mr. Record since about November the 10<sup>th</sup>. So that was a followup. To just reenforce – once again it was not probation, but to reenforce."

The document is from November 10<sup>th</sup>. She didn't talk to me. There was no follow up with these concerns that she indicates in Exhibit 10 and furthermore:

#### Bullet 1

The only time one of my visits to Ms. Lance could have been noted by Zions management was on the 25<sup>th</sup> of October, which was a Sunday.

1. Ms. Lance, her husband and her daughter all wanted me there. She and I were good friends.
2. She'd been diagnosed with Creutzfeldt-Jakob Disease the day before (and I'd been notified and arrived about an hour later that evening).

3. Zions does not have jurisdiction over the Intermountain Medical Center nor who can be compassionate to whom. RECORD
4. Ms. Tanner and I did not go to the hospital together.
5. Ms. Tanner did not need to take a vacation day on a Sunday...and, if she had for another day, what concern should her time away from work be of the company's?
6. Although I occasionally worked on Sundays, my scheduled days of work were Monday – Friday. I was not inappropriately absent from work.

#### Bullet 2

This is extremely odd. Again, there are no references to anything specific. What was said by whom from what affiliate on what occasion and how did it relate to me?

#### Bullet 3

Brent (who works down the street) should not have reported anything. If Mr. Riggs were the individual reporting the closed-door meetings, then he is wrong. Ms. Tanner and I never met alone behind closed doors. The only time my office door was closed with Ms. Tanner in it was a brief meeting when another individual was in the room with us. My blinds were open and all three of us were in full view. My immediate supervisor, Mr. Cordon Hunt, testified (Page 68, Lines 35 – 37) that he did not even see me in closed door meetings with Ms. Tanner. His office was adjacent to mine (when I had one).

#### Bullet 4

I'm not sure who "We" is, but we exceeded the very loose "manage perceptions," were given no specific directives and held our interactions to a standard no one else maintained. We did work together...and we were told to do that. I supported her department from a security point of view and with respect to reports and screen modifications. I was responsible for revising a primary collateral screen and was trying to incorporate additional features for Ms. Tanner's department. This was not a secret. I consulted with Mr. Shawn Clegg and Ms. Kimberly Ramirez from Ms. Tanner's department as well. There were additions being made for Mr. Riggs as well and I went to him for final approval before forwarding it to Information Technology on the 6<sup>th</sup> of November. I specifically noted some changes that Ms. Tanner had requested.

#### Bullet 6

We were given no formal counseling and we did our very best to manage perceptions. It's hard to carry out one's work if someone chooses to perceive a meeting about screen development as very insubordinate. We did choose to act...not because it was fair or correct...but because we valued our employment and were, contrary to the claims, doing our best to work and not meet as friends. No one asked me anything about my behavior until Mr. Ratliff and Mr. Hunt and I met. After our review of the allegations that Mr. Ratliff brought to me, Mr. Ratliff provided Mr. Hinds with an e-mail (Exhibit 20) explaining that my behavior was appropriate and the allegations were actually not founded in reality. I particularly liked Mr. Ratliff's "I understand the need for an anonymous way to communicate concerns to HR but hope that we find balance and complete the due diligence of fact checking before jumping to conclusions, particularly to protect someone in case the anonymous complainer has an agenda." On the other hand, I don't understand why Mr. Hinds would choose to suggest that something was "under control," when nothing insubordinate was occurring. I tried to get him to explain that (Page 42, Lines 07 – 23), but without success.

Page 40, Line 29 – Page 41, Line 12: I tried to get Mr. Hinds to indicate something that I'd done to make him feel that I was insubordinate. Given the response of Mr. Ratliff's e-mail, I was at a loss. I wasn't disregarding anything that had been told to me by Ms. Battista and, at that point, she was the only one who'd asked anything of me. None of the comments made are anything but unfounded generalities and, in reality, hearsay. Ms. Battista, Mr. Hinds, Mr. Clark, Mr. Hunt...none of them ever witnessed anything to support the rumored behavior.

Page 10, Lines 03 - 13: "I don't know their exact relationship but it's serious enough to look like he's cheating." Again, there are no specifics. No dates, no described behaviors...hearsay, speculation and by virtue of the complaint, creation of a hostile work environment (not from a legal sense, but requiring me to change my behavior to try to dodge assaults at my character). Heterosexual friendships do exist without a required sexual component. At one time, Consumer Loan Servicing, the group my team supported had about ninety people. I think there were two men...one vice president and one worker. It's reasonable to assume that many of my friends at work would be women.

Page 10, Lines 17 - 21: It's interesting that I am now learning of the "bullets" of the complaint relative to me. At the time, only generalities were shared. DWS has been the only way that I've learned of those details or of the allegation from Ms. Hanson. The only significant item would be my unwillingness to attend meetings prior to 3:30..., which is not true and easily documented. My team's weekly meeting was at 10:00 on Monday mornings...and was set at that time to accommodate another team member. I didn't decline formal meetings prior to 3:30 as would be noted in Microsoft Outlook or by speaking with Mr. Hunt. The comments about time away are again hearsay...not documented and likely completely irrelevant. I was a first in last out employee and seldom took a lunch break.

Page 10, Lines 26 - 26: I do not think we spoke for anything approximating that time. She arrived 48 minutes late to a meeting that she had scheduled. She was two offices away meeting with Mr. Hinds and didn't choose to ask his administrative assistant to speak to me of the delay nor make comment herself.

Page 11, Lines 01 - 06: Supporting the agenda theory, why would someone go to HR and mention an anonymous hotline complaint that they didn't create. Again, there is no specificity of whom, why, when, where, etc. I do recall Ms. Battista saying, however, that someone came into her office to say that our behavior used to concern the individual but didn't any more. That, contrary to the allegations of the mysterious Mr. Marriott (Mr. Merrill Riggs?) and Mr. Hinds, indicates that we had complied with the "directive."

Page 11, Lines 14 - 21: So...with a one-sided investigation of the alleged incident in the file room (neither Ms. Tanner nor I were asked what transpired), two Assistant Vice Presidents with a combined 31 years of exemplary service were terminated. The assumption was that we were guilty...based on a 9-year clerk who may have seen an opportunity to gain some fame and avenge her coworker's inability to be rehired by Ms. Tanner. Neither Ms. Tanner nor I could refute Ms. Hanson's allegation since they were not shared with us (until 11 MAR 2010 by DWS). I was told by Mr. Hinds that he wouldn't have brought me into his office if it had only been a conversation (Exhibit 13). Since that is, in fact, all that transpired, there were no grounds for termination.

Page 11, Lines 25 - 28: Ms. Battista did not meet with me in November. As mentioned, my work was to support Consumer Loan Servicing and the six affiliate banks that it supported. Ms. Tanner's department (Titles) was part of what I supported. Work dictated that we were together occasionally. We were told to manage perception, but one cannot control "people" if they have a pre-determined agenda.

Page 11, Lines 34 - 36: Ms. Battista says "Yeah, the door remains open." and then says "So the door could have been open." The reality is that the door was open...that is not under discussion. I'm not sure why she flopped that. Take pause and answer why a 55-year old man would take any risk of "being caught with his pants down" in an open room with security or other lights on adjacent to a busy mail room and off an unlimited access hallway.

Page 12, Lines 11 - 26: I worked on the second floor, but I supported people on both floors of the Retail Loan Center. As noted by Ms. Hanson herself, I left the conversation with Ms. Tanner in the file room and went to speak to Mr. Mather (Ms. Hanson's boss's boss) about an issue with a California Bank & Trust internal customer. I had been working on that prior to my meeting with Ms. Tanner and was conferring with Mr. Mather for a resolution. This is another specious line of reasoning intended to create doubt about our intentions.

Page 12, Lines 28 - 30: This is untrue. I had had an office for approximately eight years. ~~During the~~ **RECORD** Consumer Loan Servicing reorganization, my office was taken from me. With the kind help of my supervisor, Mr. Hunt, and his manager, Mr. Ratliff, the Dealer storage room was being converted to an office for me. My boss arranged the assumption of the space with Mr. Hatch (over Dealers), I helped empty it out and had given my approval to the final design of the cabinets and such on February 12<sup>th</sup> to Property Management. On Tuesday, February 16<sup>th</sup>, someone else started looking at the office. It was to be built to my specifications the next day, but it was taken away from me and given to someone from downstairs.

Implicit in all of this is that Ms. Tanner and I could have met in an office or a conference room without creating concern. In reality, when we did meet in my office during the first week of November to review the final changes of the CLPA (Primary Collateral Screen), we were taken to task by one of our unknown assailants. Earlier in the development of the screen, we met in Ms. Tanner's cubicle area. Her then manager, Ms. Sheri Lance had told her that if she didn't work with me that she would be at risk of losing her job. Ms. Tanner chose to work in her cubicle area instead of my office to insure that we were managing perceptions and would not be misperceived. Her then employee, Ms. Ramirez had her headphones up at such a volume that we could hear her music quite clearly. Our entire conversation was about CLPA. When a phone call came in for Ms. Ramirez, Ms. Ramirez didn't hear it. Ms. Tanner picked up the call, placed the customer on hold and tried four times to get Ms. Ramirez's attention. She was unsuccessful. Ms. Tanner sent an e-mail indicating the message and that the headphone use would have to stop if she couldn't care for her customers. Ms. Lance, who had bid us good day on her way out, noted the inappropriate use of headphones and sent an e-mail to Ms. Ramirez as well. The very next day, Ms. Tanner was called to Ms. Battista's office and told that Ms. Tanner was not abiding by the guidance she'd received in September. Coincidence? So...whatever...Mr. Clark intended to do by saying a low profile meeting was unnecessary suggests a complete lack of understanding of the incredibly out-of-control, mean-spirited behavior of some anonymous people. Recall the comments to Ms. Battista about the hotline complaint. Some anonymity...if coworkers knew of the complaint and used it as a basis for their comments. There was a highly unusual closed-door, closed-blinds meeting of Ms. Ramirez, Ms. Curtis and Ms. Sharp at 4:30 on the afternoon that the 4:00 p.m. e-mail was sent from Ms. Lance. Those three ladies have never met together alone before or after. The next day...more complaints? Coincidence?

Page 13, Lines 17 - 30: This is yet another indication of my challenge with the original telephone hearing. The ALJ kept me in line, but I never understood when my A-Z testimony could occur. Ms. Battista indicates here that she spoke to me in November. It didn't happen. What makes this more exacerbating is that she had the Microsoft Outlook tools to know when something transpired. I've been denied access to all of my e-mails, etc. She and Mr. Hinds pushed a "preponderance" of information into view, but much of it is inaccurate and all of it is hearsay. Neither of them, nor Mr. Clark witnessed anything that they are claiming.

Page 13, Line 41 - Page 14, Line 07: During the telephone conversation on the 24th, she said she hadn't talked to me since August...but we never talked prior to September. Here she's referencing a conversation in November that didn't happen.

Page 14, Line 09 - Page 15, Line 04: This is yet another example of wrong information. She's working with a number of people, but she's destroying my life. Trust me, I'm paying a lot of attention to detail. I've never been in an employment situation where my behavior was questioned. How can she refer to Brent Marriott instead of Merrill Riggs as a typo? "Just the name" was incorrect? It seems who did what is rather critical...for humor's sake, perhaps I wasn't the person who should have been terminated. She repeats Brent's name rather than Merrill in the third bullet. Her documentation is grossly inaccurate. She recorded my absence from work as if I were AWOL (many individuals use "lunch" to run errands). She recorded no date, no time...nothing. Why would she transcribe the complaint without any due diligence. Again, there is no explanation why Mr. Riggs should visit the hospital, but I, invited by Ms. Lance and her family, should not. Where is there any documentation saying that I should not visit Ms. Lance? If there were any, since when does

Zions Management Services Company control time away from work...or the friendships of its employees outside of work? "Mr. Riggs was there himself with you." In the 24 FEB 2010 telephone conversation, Ms. Battista indicated it was Mr. Hinds. RECORD

Again...the ALJ reminds me that during my testimony portion...

Page 15, Lines 10 - 26: There are three pieces of this that are interesting. One that "manage the perception" which has been acknowledged. On Page 09, Lines 18 - 19 "and they were asked to kind of, you know, stay apart unless it was a business reason." We were not given that directive.

"I obviously, you know, couldn't", you know, at the time validate any relationship as these are complaints from other people." She never could nor did validate any inappropriate relationship because it didn't exist.

Finally, as mentioned earlier, we did not meet behind closed doors...ever. That was confirmed by my supervisor, Cordon Hunt in his testimony and could have been by Ms. Fuller if I'd been allowed to have her as a witness. Additionally, I do not think Ms. Battista raised that issue in our September meeting...and the comment "for a long period of time" is absolutely ridiculous. My office was in the middle of the long hallway...blinds were open...door was open if Ms. Tanner were in my office and any and everyone would have full view. I think the closed door issue was "documented" by Ms. Battista as something told to her by "Brent" (a.k.a. Merrill Riggs) in her November 10, 2009 document.

What happened is that false statements were repeated and re-presented in so many different forms, that they created a reality, however fictitious, that lends credence to Zions claims. Unfortunately, the nature of the hearing (not allowing me to refute inaccuracies aggressively as they were presented...and being reminded repeatedly to await my testimony) created a wonderful opportunity for Zions. First impressions are difficult to undo...and these falsehoods were the initial presentation and they were repeated directly and indirectly over and over again. I was told prior to the hearing that Zions had the burden of proof, but please note that virtually nothing presented by Zions regarding my behavior is accurate and virtually all of it is hearsay.

Page 16, Lines 13 - 30: It is mind boggling to me that a Vice President of Human Resources would choose to record from Mr. Hinds in Exhibit 8:

"the company had spent considerable time and money in addition to formal counseling and written probation" when formal counseling would typically involve an employee signing a document and a specific set of behaviors that needed to happen or not happen and the consequences associated with same. If there had been formal counseling or written probation, Ms. Battista would, could or should know of it. Yet, she recorded the comment without any hesitation. That Exhibit 8 was read by the ALJ before the hearing. It was a blatant inaccuracy and one that both Ms. Battista and Mr. Hinds acknowledged during the hearing. Why so many errors? What credence should the ALJ have of these people who are inaccurate or lie about dates, individuals, actions? Where is the proof of any of the three items that are required to deny me unemployment? Is "at no time did we discuss probation" (Line 17) or "this was the first time that we were having this conversation that I didn't feel I needed to go to your supervisor." (Lines 22-23) sound like formal counseling?

Page 16, Lines 25 - 30: Why would Ms. Battista be at liberty to tell members of the Department of Workforce Services information about an anonymous complaint, but not the individual who is being accused? Why would Ms. Battista not be able to tell me what Ms. Hanson was alleging occurred on 19 FEB 2010?

Page 16, Lines 32 - 35: Ms. Battista did say it was a formality. That doesn't sound like something that I should have worried about...but I did minimize my contact with Ms. Tanner and reserve it for work-related issues.

Page 17, Lines 07 - 24: Ms. Battista did not indicate to me what Ms. Hanson alleged happened in the room. It would seem that the details are absolutely imperative to the case. Having a business discussion with a coworker is not grounds for dismissal. Being naked in the building with a coworker could be. We were not even partially undressed. The descriptions throughout the testimony vary, but none of them is accurate. We were fully dressed during the entire time.

Page 18, Lines 03 - 06: Ms. Battista did not explain how my last paycheck and all of that would be handled. I called on the 24<sup>th</sup>...two days after my separation...not several weeks after. Ms. Battista, Vice President of Corporate Human Resources seemed comfortable quoting the Employee Handbook for purposes of Ms. Hanson's behavior, but had no knowledge of the arbitration opportunities in it...and was unwilling to share them at my separation when I inquired.

**JEFFREY S. RECORD**  
4694 Wallace Lane  
Salt Lake City, UT 84117-5552  
801-386-3311

RECORD

LEGAL SECTION

JUN 15 2010

J.D.W.S.

June 2010

Workforce Appeals Board  
Box 45244  
Salt Lake City, UT 84145-0244  
801-526-9244 (facsimile)

Subject: Additional Documents (Photos) Response to Case No. 10-B-00671 (Appeal of Case No: 10-A-04727)

Sir/Mes/Gentlemen:

Please review the attached pictures, which were taken last evening from the doorway of the file room where the business discussion took place and where, Ms. Brandy Hanson alleges to have seen Ms. Tanner and me ~~alleged~~ half-clothed. This was my first opportunity to view the room after my ejection from the company. In the bigger picture, I am actually sitting on the cart that is described in the picture.

The room is approximately as it was at the time of the alleged incident. Some of the items that were in the room have been removed or moved. More interestingly, however, the shelving next to the back aisle where Ms. Tanner and I met had been removed with the exception of the very bottom shelves. That back-to-back shelving and the chrome cart at the back. If it and its stops were in place, the line of sight would be even more restricted.

The pictures aren't perfect; we were requesting that we restore the shelving, but the opposing attorney denied our request. It was not a particularly welcoming environment.

As you can see, even without that final set of shelving, it would be impossible to see what Ms. Hanson claims to have seen. Please note this material evidence and review the credibility of Ms. Hanson's testimony.

Thank you very much for your consideration.

Sincerely,



Jeffrey S. Record

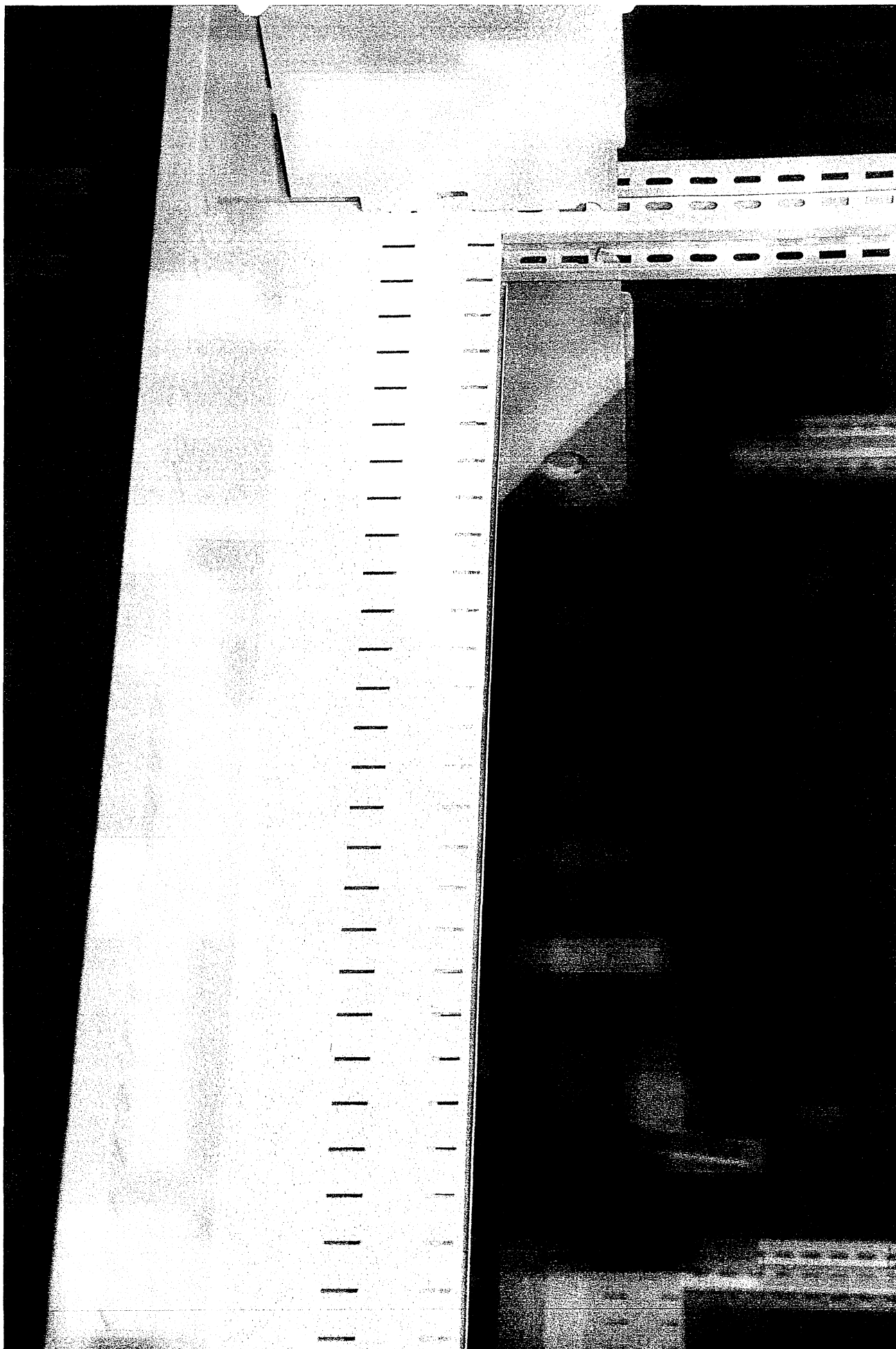
Attachments (Photographs)

VERTICALS ON THE CART AS DESCRIBED ON THE HEADING.

LEGAL SECTION  
JUN 15 2010

JUN 19 1964





LEGAL SECTION

JUL 15 2011

7. Once I learned about Ms. Hanson's accusation, I attempted to get friends of mine <sup>RECORD</sup> who still work for Zions to take photos of the file room to submit with mine and Ms. Tanner's unemployment documents, to show that Ms. Hanson was not telling the truth.

8. The two friends that I asked to help me were too afraid that they would be fired for helping me to obtain photographs for me.


9. Ms. Tanner and I retained an attorney, who filed suit on our behalf against Ms. Hanson for defamation and intentional interference with economic relations.

10. After we filed the suit, Zions attorney allowed Ms. Tanner and me to go to the file room, with our attorney present, to take photos of the room. We went to Zions on June 14, 2010 to take photos. This was after both Ms. Tanner and I had had our unemployment hearings.

11. While we were taking the photos, I gave Ms. Tanner my camera and went and sat exactly where I was sitting when I had the conversation with Ms. Tanner for which we were fired. Ms. Tanner then took a photo of the view from the door to where I was sitting.

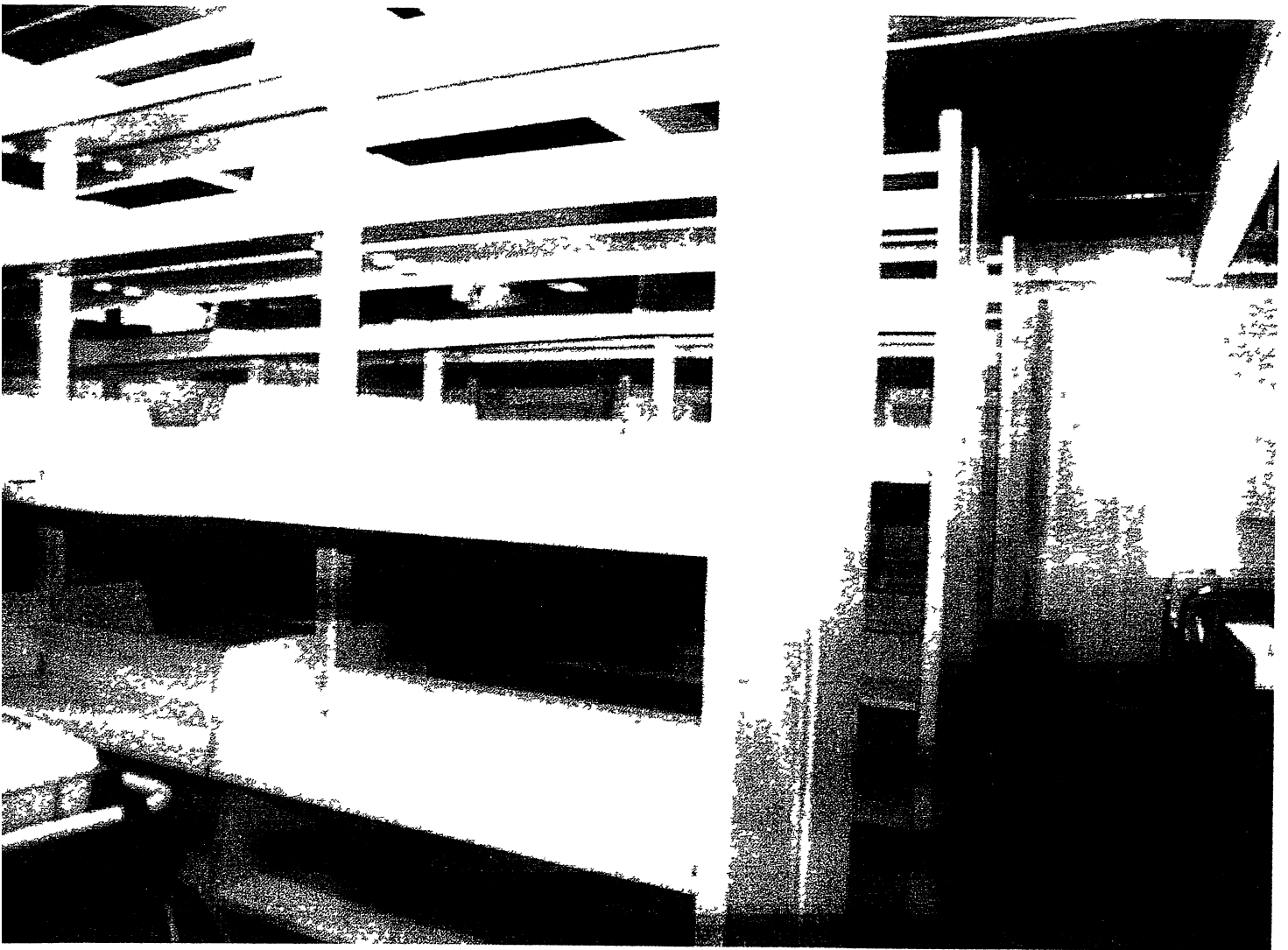
I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on this 7<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
Jeffrey S. Record

ADDENDUM E

RECORD



MAR-10-2010 WED 05:01 PM  
MAR-10-2010 05:01 PM LMS - 1073 0010442270

FAX NO.

ADDENDUM E  
DWS 03/10/10 @ 17:03  
P. 05  
4/10 ✓  
TANNER

11/10/09

Note to employee file of Emilie Tanner

I met w/ Emilie to review the previous discussions she had had w/ Sheri and Deborah Battista regarding interaction with Jeff Record.

I again reviewed:

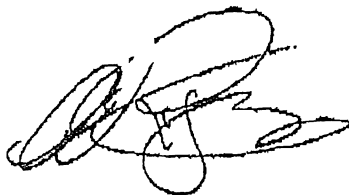
- > she had been observed repeatedly in Jeff's office, sometimes w/ door closed
- > she had been observed on personal calls
- > she had been observed w/ Jeff -- leaving the department area

She denied that she used her cell phone to talk w/ Jeff and that she was only in his office to discuss work requirements.

I reminded her and indicated that the expectation was

- > not in Jeff's office at all
- > conversations w/ Jeff were to be work related only
- > personal calls are to be handled on break or lunch
- > not to leave department w/ Jeff

I indicated that since this had been previously reviewed and if it occurred again, she could be terminated.

A handwritten signature in black ink, appearing to be "RJ" or similar, with a large loop and a horizontal line extending to the right.

MAR-10-2010 WED 05:01 PM

FAX NO.

DWS 03/10/10 @ 17:03

P. 06

✓  
TANNER

**MEMO**

September 23, 2009

Deborah A. Battista  
VP/Director Human Resources Zions Bancorporation

**Subject: Code of Conduct complaint against Emilee Tanner and Jeff Record who both reside at the RLC**

This memo summarizes individual meetings with both Jeff and Emilee regarding the nature of this complaint.

**Issue Summary:**

1. Complaint received through the company hotline alleging that Emilee Tanner, Lending Supervisor is having an affair with co worker Jeff Record, Lending systems administrator.
2. Met with each employee individually to discuss the nature of the complaint. Both employees disputed the allegation.
3. Jeff Record discussed the department and how his daily activities do include interactions with Emilee, however never inappropriate.
4. I reminded them both to watch for perceptions and to assure they don't create an uncomfortable working environment.
5. No further action required.

DAB  
09/23/09  
Attachments

TANNER

CLARK           And would you spell your name for the record?

BATTISTA       Deborah Battista. It's B, like in boy, A-T-T, like in Tom, I-S-T-A.

CLARK           And the first name; did you spell your first name? I think I missed that.

BATTISTA       I'm sorry, Deborah, D-E-B-O-R-A-H.

CLARK           Okay. And are you familiar with Ms. Tanner?

BATTISTA       With Emilie?

CLARK           Yes.

BATTISTA       Yes.

CLARK           And how were you familiar with her?

BATTISTA       In the summer - last summer of '09, I received two actual complaints about Emilie and Jeff Record. It was from our global compliance. It's a third party vendor. It's a hotline. It's anonymous. And in my role as the head of HR, I often have - well, I always review them for my client groups, of which Emilie worked in one of our - my client groups.

                  And we have to follow the details, and so I did call her in, which I think that discussion is documented in one of the exhibits. It's the memo of, I think, September 23rd. And it was just a coaching session. We have to answer these global complaints, and that's where I first met Emilie.

CLARK           How long had you been working with that particular part of Zions Bank?

BATTISTA       I began that in June of last year to take on that client group.

CLARK           And prior to that time had you heard any - did you know anything about Ms. Tanner or her work history. or anything?

BATTISTA       I did not.

CLARK           Okay. Explain briefly the nature of - well, looking at exhibit - what's Exhibit 11, do you have those exhibits?

BATTISTA       I do, sir.

CLARK           And explain briefly the nature of that conversation that you had with her.

TANNER

BATTISTA This conversation was about the fact that I had received a couple of complaints from the hotline. I also had a couple of managers who had just come into my office and had expressed concern knowing that I was looking at this, and that they just wanted it to be on the record that they were aware of an inappropriate relationship between Emilie and Jeff. And so I continued to, you know, look through some of the facts. And I had the global compliance information and I also had, you know, two employees.

And so I had asked Emilie to come into my office, and we just talked about - you know, no judgment there, but just talked about managing the perception. I said whether this is true or not true, this is, you know, a few months in the making and it's coming from several sources. And so I'm just asking you to make sure that your actions in the workplace are appropriate and that you keep some professional distance and you certainly work with the other party, Jeff, when you need to, but that you maintain a professional relationship. And at the time she had supervisory responsibilities, so I also encouraged her to make sure she, you know, exemplified a good role model.

CLARK What was her response to your comment?

BATTISTA She denied the relationship that was inappropriate; said there wasn't anything going on. But I told her, well, if there is or isn't, there's something that you're doing in the workplace that your co-workers are starting to have some real concern. And that was the first session, and I just told her, look, you know, you're a supervisor and you need to make sure that you're, you know, you're a good role model for your group, and I would just stay away from Jeff. Whether there's something going on or not, there's a lot of people talking about it, so. She agreed when she left. And I did the same thing for the other party.

CLARK Did this issue - did this issue end there?

BATTISTA I did not have any other further action, you know, as from an HR perspective until about November. I did talk with her again in November. There - and I think there are some additional documentation in this file about that. But I just reinforced managing the perception once again. I know that her supervisor at the time, you know, had several conversations with her and coached her about, you know, staying away from Jeff.

We moved her office. We did some things to try to manage that. But this supervisor went out on very serious illness on long-term disability. And in this time of coaching her in November, she and Jeff chose to go to the hospital, which no other employees did. And we were trying to refrain people from, you know, having interaction, but they claimed that they were friends, and so they went to the hospital together. And the acting manager at the time came and had some concerns that they were still spending a lot of time together.

CLARK Now on this memo, which looks like it's Exhibit 9 -

TANNER

BATTISTA Yes.

CLARK - talks about the acting manager, and it actually gives two different names to the acting manager; could you address that?

BATTISTA Yes. Sherry was her immediate supervisor. Sherry Lance, and she went out on long-term disability in August. And so the acting manager at the time was Meril (phonetic) Riggs. And she -

CLARK It says Brent Marriot. Was he the acting manager also?

BATTISTA I'm sorry, say that again.

CLARK It says on that - the first - the second line of that says Brent Marriot.

BATTISTA Yeah. That's my - I corrected the file, but that was my mistake. It was supposed to be Meril Riggs. I just had a wrong name in there.

CLARK Oh, okay. So what happened in November then with this issue?

BATTISTA Yeah, Meril Riggs came down and said that he was at the hospital when these two came in and was very surprised to see them together and at the hospital. And was concerned about some of the communication they were having in the organization about Sherry. There was a lot of - it was very serious issue, and still is; she's out on long-term. And we were trying to manage the communications, and she - or not she.

Meril Riggs and David Hinds, who is the EVP, had some concerns that they were sharing information from what they observed in the hospital room with some of our customers, and just were, you know, not really comfortable that the two of them came together for the hospital visit.

CLARK Do you know what day of the week the hospital visit took place?

BATTISTA My understand - I don't have the exact date. It was a workday. Because my understanding is that Emilie actually took a vacation day, but Jeff was there on company time. That's what was communicated to me by Meril.

CLARK Okay. And then what happened, if anything, after that?

BATTISTA Really I personally - I wasn't communicating to either one of them until the February incident on February 19th.

CLARK And what happened on that occasion?



TANNER

employee anonymously can write in. And there were complaints about their inappropriate behavior, their conversations. you know, inappropriate -

JUDGE Well, then we'll need to break that down into two parts then. So what was the inappropriate behavior?

BATTISTA Okay. I mean, it's - two people have written in that they're uncomfortable with them in the workplace. Let me - let me just - hold on one second and let me get the actual - okay. So this one - some of the comments in here are - they're complaints about this - about Emilie or not being at her office or desk when needed. I think this is some her (inaudible) employees; although, Your Honor, we don't know who wrote this in.

JUDGE That's fine. I don't need to know. Just understand because, you know, inappropriate behavior is very vague. I just wondered exactly what the inappropriate behavior was. So she wasn't at her office or her desk. What else?

BATTISTA That they managed their time with each other. "He is not able to do projects or meetings until after 3:30 because of her jealousy. Both are away from their desks for long periods of time, not just at lunch or needing a break." They have been talked to by their supervisors, but they're - nobody's really doing anything about it. When her manager leaves her office at lunch, they are in his office for the entire hour almost every day with the door closed.

Let's see, she gets jealous when other female employees talk to him. It's been happening for a while, but it's getting worse. Everyone just pretends that it's not happening. He's married and cheating. I don't know their exact relationship, but it's serious enough to look like he's cheating; too personal for a work environment, very unprofessional and affects the co-workers. I'm coming forward. It isn't stopping, and I'm tired of having to see it every day all day long.

JUDGE Okay So there were co-workers who were concerned that Ms. Tanner was spending too much time with Mr. Record?

BATTISTA Yes. And that they were behind closed doors. and that they're seen, you know, leaving with each other.

JUDGE All right. Was there anything else out of the ordinary in these complaints?

BATTISTA No. I did have two managers from another group that knew I was looking into this, but didn't want to be acknowledge, but came in and said, you know, I work in a different department, but I see this too and there are a lot of employees that are upset that these two are, you know, having this perceived cheating relationship. And if you're looking into it, I just want to let you know that I have observed this and so has my department. So I had two people do that in the course of me looking into this into September.

TANNER

JUDGE            So given these concerns that were emerging, did you give any specific instructions to Ms. Tanner to avoid being seen with Mr. Record?

BATTISTA        Yes. I really coached her a lot on the whole thing about managing perception. You know, at the time when I first talked to her, I didn't accuse her or tell her - I didn't personally witness this, but I have to follow up on these numbers of resources and complaints. And I told her there were multiple complaints.

So I said, you know, you need to act professionally. I said, you can certainly spend time with if it's in the relationship, you know, to the job, or the job getting done. But we would prefer that you do not go into his office with the door closed for periods of time. We did move her office. That concerned a problem with one of her teammates, and so we kind of moved her office. We moved him eventually out of his office out into the floor into an open area. And it was all to kind of help them to manage this, you know, a close relationship.

JUDGE            Okay. So she actually had to be moved as a result of these concerns?

BATTISTA        Yes.

JUDGE            All right. Now when you conducted your investigation of the incident that actually led to the discharge, what led you to believe that there was something that was actually inappropriate going on in that room?

BATTISTA        I was told by David Hinds, the EVP of the retail loan center, that an employee had come - and he told me what the employee had witnessed.

JUDGE            All right. And when you -

BATTISTA        And -

JUDGE            Oh, go ahead. I'm sorry.

BATTISTA        I'm just going to say that since I felt that, you know, I thought it was best to remove both people from the workplace. But since it was a situation, you know, in a mailroom, dark, and because we had coached these two people, and the seriousness of what the witness described and what she saw, I just felt it was best to remove both people and then I could seek internal counsel, you know, our legal team and just make sure that we had, you know, all of our ducks in a row.

JUDGE            All right. And when you actually sat down with Ms. Tanner to advise her of what was going on, had a decision already been made to discharge her?

BATTISTA        Yes. Because we, you know, had a - kind of a sworn, you know, statement from the

TANNER

witnesses to what the person saw. We took a look at the room and the situation. I took a look at the history that I'd had for, you know, I guess about five, six months, and the counsel that I had done before. And just that incident on February 19th met the requirements of a termination. But having the history and the pattern just, you know, brought us to the decision a lot quicker.

JUDGE And then when you actually advised Ms. Tanner that she was being discharged, did you specifically refer to the incident?

BATTISTA I told her that the grounds for termination were because she was seen in this dark room inappropriately with another employee, and that the grounds for termination were because there was a pattern and a history: that this was creating a hostile work environment; that she had been coached a couple of times. She had also been directed by her supervisor. So it led us to this decision that we were going to terminate her employment. I asked her if she had any questions, and she replied no.

JUDGE And did she dispute what you were telling her at all?

BATTISTA No, not at all.

JUDGE And do you offer any type of a grievance process for which employees who have been discharged can appeal the Employer's decision?

BATTISTA Not that I'm aware of, of a formal process, no. We, in our handbook, can give you the arbitration board, you know, for Utah if you want -

JUDGE Okay. So you would refer that to an outside source. There's no in-house grievance procedure where an employee can dispute a termination?

BATTISTA There is not, no.

JUDGE All right. And then as, you know, the human resources professional for your employer, can you tell me why it was necessary to end the employment relationship? What was the harm to the Employer?

BATTISTA The grounds, you know, in our code of conduct is, you know, seeking internal counsels, our attorneys, you know, when we discussed the case felt that because I had the pattern, for one thing, but the other, just that incident on February 19th, that two employees behaved in that way, that was grounds for termination.

JUDGE Okay. But could you go into a little bit more detail and tell me how that negatively affects the workplace; how, you know, it was necessary for discharge, rather than engaging in a less severe form of disciplinary action?

## ADDENDUM E

TANNER

CLARK            Okay. There's an exhibit in the file that appears to bear the same name that you just identified, Exhibit 12.

HANSON          Uh-huh.

CLARK            Could you tell us what that's about?

HANSON          It was just saying that on February 19th I went into an empty file room to blow my nose and flipped on - well, I heard some noise; flipped on the lights and saw two people and they were half clothed. I walked out of the room and stood by the filing cabinet and waited to make sure that I properly identified them.

CLARK            Would you expand a little bit on that: make sure that you properly identify them? What does that mean?

HANSON          Make sure that I knew who it was -

CLARK            Did you know?

HANSON          - that was coming out of the room. Yeah, I did see them. I just wanted to make 100% sure that that's who it was.

CLARK            And when you say you saw them, could you be a little more specific as to what you saw?

HANSON          When I walked into the room, I heard rustling; flipped on the light. Emilie jumped up. And Mr. Record's pants were not on, so he jumped up and pulled his pants up. And I walked out of the room, stood by a filing cabinet outside of the room because it's the only exit that I'm aware of, and waited to make sure that that's who it was before I went and said anything.

CLARK            When you say you saw them, what - could you describe the, I guess the word would be posture or placement of the two individuals?

HANSON          They were in the back corner of the room. Jeff was sitting. Emilie was on him, sitting on his lap. And they jumped up very quickly as I turned the light on.

CLARK            What about these parties; could you see - how much of them could you see?

HANSON          I could see their faces and the filing cabinet. It's a filing room, so there's parts that are blocked. But I saw legs and I saw faces.

CLARK            And describe the legs.

HANSON          They were bare.

TANNER

Tanner, how long have you worked for Zions First National Bank?

CLAIMANT Seventeen years.

JUDGE When did you start working?

CLAIMANT What day?

JUDGE Yeah.

CLAIMANT It was January 25th of 1992, I believe, or '93.

JUDGE All right. And then your last day of employment was February 22nd?

CLAIMANT Yes.

JUDGE And at the time of your discharge what position did you hold?

CLAIMANT (Inaudible) lending supervisor.

JUDGE Okay. And did you specialize in one particular field of lending?

CLAIMANT I worked with car titles and then also I did what are called renewals. So we did Amegy renewals and car titles. So incomplete collateral basically.

JUDGE And when did you become the lending supervisor?

CLAIMANT I was the supervisor for about eight years.

JUDGE Okay. And based upon your understanding of your separation from employment, do you feel that the Employer had discharged you involuntarily?

CLAIMANT Can you rephrase that? I don't -

JUDGE Did you - was it the Employer was the moving party in ending your employment; were you discharged?

CLAIMANT Oh, yes.

JUDGE Okay. And on what day were you discharged?

CLAIMANT On the 22nd.

JUDGE And who was the person who discharged you?

TANNER

CLAIMANT I wasn't sure, Your Honor.

JUDGE So what else did you think could have been the reason?

CLAIMANT You know what? I really didn't know. I was very confused.

JUDGE Okay. But you didn't ask any questions then?

CLAIMANT I tried to ask questions and I just got, you know, shot down. And she was, you know, not very nice and so I just - I figured I couldn't do anything about it.

JUDGE All right. So you weren't sure exactly what it was that motivated the Employer to discharge you, but at the time you suspected that it was because you had had a conversation with Mr. Record in the storage room?

CLAIMANT Yes.

JUDGE Okay. And why did you think that the Employer would be concerned about you having a conversation with Mr. Record in the storage room?

CLAIMANT I don't know. I didn't know why they would have had a problem with that.

JUDGE Okay. Had the Employer ever given you any type of informal advice that you needed to avoid Mr. Record or keep the appearance of your working relationship in check?

CLAIMANT I was told on - when I talked to Deborah Battista on the 22nd that I should manage perception. When I asked her what that was, she said I'm not going to tell you how to act; just manage perception. So that's when I kind of cut off as much contact as I could with Mr. Record until I was told by supervisor, Ms. Lance, that I was required to work with him because we were actually working on about eight projects.

JUDGE Okay. So you understood with Ms. Battista's advice that you needed to manage your perception; that you needed to avoid any unnecessary contact with Mr. Record?

CLAIMANT Well, any - any personal, right; if it was personal.

JUDGE Okay. So is there any reason why you needed to meet with Mr. Record in an unused storage room on a floor where you didn't work?

CLAIMANT Well, I went down there every day for my break. I was actually in the middle of having some mental health issues, so I needed to go down and do some meditating and stuff that my therapist kind of told me that I needed to do. So I would go down there every day, so that wasn't odd for me to do that.

TANNER

- JUDGE All right. And was there any reason why Mr. Record was there?
- CLAIMANT Well, he asked me if I could give him some information regarding back dating a - back dating an interest on renewals. And I said, well, I'm just about to leave, so, you know, I'm going on a break. And he said, well, I have to go down there anyway, so do you mind if I just come down for a second? So I said no. And I kind of, you know, had about a five-minute conversation with him.
- JUDGE All right. So is there any reason why you couldn't have postponed discussing this, or just discuss that briefly before you went down?
- CLAIMANT Well, I didn't really think about it. I just thought I was going down there. And, you know, I was stressed out. I just wanted to make sure that I was able to get my time in, and I figured a couple of minutes wasn't going to hurt, you know, my -
- JUDGE So you were going down there to meditate. Why not talk to him first so that you could go down and, you know, meditate in peace without somebody bothering you about work?
- CLAIMANT I don't know.
- JUDGE Now when you two were in the room together, were the lights on or off?
- CLAIMANT It has security lights on all the time.
- JUDGE Okay. So I know the security lights, but were the room lights on or off?
- CLAIMANT They were off.
- JUDGE Okay. Now is it a pretty dark room?
- CLAIMANT I would say it's, yeah, pretty dark.
- JUDGE So -
- CLAIMANT But I made it, you know, that way. That's how I wanted -
- JUDGE Right. Anybody who would meditate would want it dark. But wouldn't you think it would be odd to be in a dark room with a co-worker, even if you were just talking about business?
- CLAIMANT Well, I - you know, I've seen people down there also talking. It's not unusual for people to be talking in that room. So I didn't find it unusual, no.
- JUDGE Okay. So just why not flip on the lights and sit down? I just don't understand why would

TANNER

meeting with Mr. Record, who told them?

CLAIMANT No, I was not.

CLARK You didn't know who that was?

CLAIMANT No.

CLARK Did you know the gender of the person that - that had reported this?

CLAIMANT I was never told.

CLARK You were never told, but did you know who it was that -

CLAIMANT No.

CLARK - reported it? When you - when you talked to the state agency about your claim, there's a record of it on Exhibit 14 what you said at that point. Well, let me back up a second. When you were in the conference room in that corner and someone turned on the lights; could you see who it was?

CLAIMANT Yeah, I thought I could see who it was. I actually ended up being wrong. But I could see the person, yeah.

CLARK Did you know if it was a male or a female?

CLAIMANT Yes.

CLARK How did you know that?

CLAIMANT I could see the person.

CLARK So if you could see the person, then obviously they could see you as well, correct?

CLAIMANT Well, when I - when we went - I guess, when we - well, I was standing - or I was standing up and so I could see through right where the shelf was, you know, right where there was the (inaudible) right there. So I could see through that.

CLARK And you could see a face, could you?

CLAIMANT Yeah.

CLARK What I'm referring to on Exhibit 14, it says in the middle of that paragraph that Mr. Rich recorded when he - when he talked to you apparently; it says Claimant saw another girl



TANNER

you can provide that testimony in your concluding statement, okay?

CLAIMANT Okay.

JUDGE All right. Well, let's do that. Let's move to concluding statements then. Mr. Clark, any concluding statements you'd like to make?

CLARK Your Honor, any concluding statement would be superfluous. I think the record is very clear. The Employer is ready to stand on that record. Thank you.

JUDGE Ms. Tanner, any concluding statements you'd like to make?

CLAIMANT Well, I just want to kind of reiterate, you know, what we said here today and, you know, basically the notes that Ms. Battista took, they aren't correct. They aren't accurate. I - there's no path here. There is - there is no counseling. I'd never had formal counseling. I never was put on probation. I didn't admit to inappropriate behavior.

I went to the hospital to see my boss because she was dying and Meril showed up with his wife in their church clothes. I did not go with Mr. Record. Mr. Record got there after I was there. He had been there a lot, more than - I only went twice. There was one anonymous complaint that I know of. There - I've never, you know. I just - it's just crazy to me for, you know, to think that someone can terminate me after 17 years without even telling me the allegation or letting me stand up for myself or say what really happened or, you know, that kind of thing.

So I - I just, you know, want to let you know that I wasn't given a chance to discuss my actions. I - I wouldn't jeopardize my 17-year career and I was not anything but fully clothed in that room. I was having a discussion. I was doing nothing wrong. It's not the room that other people have been in. It's not odd to have that.

I've never been in a closed-door meeting with Mr. Record, especially after September. The only closed-door meeting I can think of was one with our administrative assistant, and that was before then. And I don't even have an office. My office was never moved. We had a global move. The whole department moved. Everyone in the department moved except for like three people, and that was like two weeks prior to this incident. And so I - that's all I want to say, and thank you for your time.

JUDGE All right. I'm going to end the hearing then. I appreciate both party's willingness to testify in today's hearing. I'll carefully review the information that's been provided today and look at this within the context of the rules outlined in the Utah Employment Security Act. I'll be issuing a written decision based upon my findings within one to ten days. I'd like to wish everyone a great day. You can go ahead and hang up your phones. That will end the recording. Thank you.

APRIL L. HOLLINGSWORTH (Bar No. 9391)  
**HOLLINGSWORTH LAW OFFICE, LLC**  
1115 South 900 East  
Salt Lake City, Utah 84105  
Telephone: 801-415-9909  
Fax: 801-415-5172  
Attorney for Appellant

**BEFORE THE DEPARTMENT OF WORKFORCE SERVICES  
APPEALS UNIT**

---

**EMILIE A. TANNER,**

Appellant,

**APPEAL OF ALJ DECISION**

vs.

Case No. 10-A-06015-R

**ZIONS FIRST NATIONAL BANK,**

Respondent.

---

Appellant Emilie A. Tanner, (“Ms. Tanner”), by and through her undersigned attorney, hereby submits this appeal to the Workforce Appeals Board of the Decision of Administrative Law Judge (“Decision”) in her case, dated May 10, 2010.

The ALJ in this case denied Ms. Tanner unemployment benefits based upon testimony at the hearing that another employee of Zions, Brandy Hanson, discovered Ms. Tanner and a coworker, Jeffrey Record, partially clothed in a file room at Zions during work hours. Ultimately, the ALJ’s decision rested on his determination that Mr. Record and Ms. Tanner “were engaging in improper behavior in the Employer’s building during office hours.” Decision at 6. Ms. Tanner

TANNER

submits that there are several reasons that Zions did not meet its burden of proof in the hearing, which will be discussed herein.

First, however, Ms. Tanner requests that the Board reverse the decision of the ALJ in this case based upon newly required evidence, pursuant to R 994-508.305. In the alternative, Ms. Tanner requests that the Board reopen the hearing in this matter so that the new evidence can be addressed by the parties. Specifically, Ms. Tanner has obtained photographs of the room where Ms. Tanner and Mr. Record were talking on February 19, 2010, and where Ms. Hanson claims to have seen the two partially clothed. As set forth in the attached declarations, Ms. Tanner and Mr. Record did not even have access to the building, let alone photographs of the file room, when the unemployment hearing was conducted in this matter. Mr. Record tried to get friends who still work for the company to take photos to help him, but they were too afraid they would get fired for helping him. Ms. Tanner was not able to obtain photographs of the room until after Ms. Tanner and Mr. Record obtained counsel who filed suit against Ms. Hanson, and Zions then attempted to dismantle the file room at issue (which had been left untouched for approximately eight years prior to the suit). Ms. Tanner's counsel then demanded that Zions reconstruct the room and allow her in to take photographs, which Zions did on June 14, 2010.

The photographs taken on June 14 demonstrate that Ms. Hanson could not have seen what she claims to have seen. Ms. Hanson claims that when she turned on the overhead lights in the room (security lights are always on), she saw Ms. Tanner sitting on Mr. Record's lap, saw them both jump up, saw that Mr. Record's pants were not on, and saw "legs and I saw faces." Transcript of Hearing ("Tr.") at 44: 25-

TANNER

40. This story is demonstrably false in light of the photographs taken on June 14.

An example is provided as an attachment to Ms. Tanner's affidavit. Notably, Mr. Record is in that photo, sitting where he was when he had the conversation with Ms. Tanner on February 19, but he is not visible. See Declarations attached. Moreover, they cast doubt on the credibility of Zions' other witnesses, Deborah Battista and David Hinds, who claimed during the hearing that they could see from the entrance of the file room to the back corner of the room. Tr. at 15: 2-5 ("when you turn the lights on, you have full view right to the back corner"); 29: 13-27.

The photograph issue aside, there are other reasons that the ALJ's decision should be overturned. The ALJ, for instance, determined that Ms. Hanson "is a disinterested party whose own well-being is not affected by the outcome" of this hearing. Decision at 5. This is not established in the record, however. Ms. Hanson testified that she worked with Ms. Tanner on car titles occasionally, but there were no questions asked or answers elicited from Zions that would indicate whether Ms. Hanson had any motive to lie in this case. See Tr. At 47.

The ALJ also made a determination that Ms. Tanner would have acted differently than she did, by disputing the allegations against her, if the allegations were baseless. Decision at 6. It is undisputed, however, that Ms. Tanner was not even told what the allegations were. Tr. At 35, 37 (Hinds admits he did not mention any allegations about her being unclothed); 42 (Battista admits not asking Ms. Tanner what happened). It is therefore an error for the ALJ to base the decision in part on her reaction to the allegations.

## TANNER

In addition to her blatant misrepresentation of the visibility in the room at issue, Deborah Battista, Zions' HR Director, should not have been deemed credible for other reasons. She testified, for instance, that Ms. Tanner had engaged in a "pattern and a history" of creating a hostile work environment (Tr. At 18), and yet does not provide any support for that. She testified that she received an anonymous complaint in the summer of 2009 regarding Ms. Tanner having an affair with Mr. Record, but both denied it, and she simply told Ms. Tanner to "maintain a professional relationship." Tr. At 11-12. Ms. Battista claims that others complained, but cannot substantiate any such complaints with names or concerns or dates. Tr. At 20-22; 41. She cannot substantiate any claims that Ms. Tanner was ever put on probation or given a written counseling for any improper conduct. Tr. at 22. (Notably, David Hinds testified that he had no personal knowledge of any inappropriate behavior by Ms. Tanner (Tr. at 37), so it is not clear why he was even a witness at the hearing.)

The ALJ also found that Ms. Tanner had knowledge of her inappropriate conduct, finding that Ms. Tanner acknowledged that it was inappropriate for her to be in the room with MR. Record. Decision at 2 ("The executive vice president asked the CLaiminatn if she thought it was appropriate for her to be in a dark room with a married coworker. The respondent answered, "no." This finding is actually directly contrary to what Ms. Tanner testified in the hearing. She stated that "he [Mr. Hinds] asked me if it was inappropriate for a married man to be in a dark room with an unmarried female? And I said no" – clearly stating that she disagreed with any suggestion that she had done anything inappropriate. Tr. At 61: 26-30.

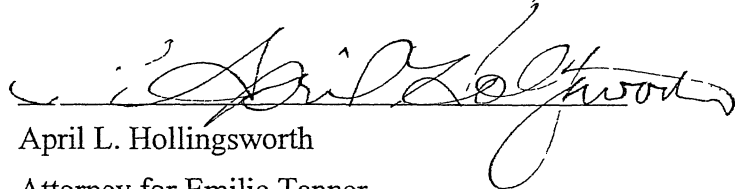
**TANNER**

Finally, the ALJ apparently did not consider Ms. Tanner's 17 years of service to Zions and her lack of a record of discipline.

For all the reasons set forth above, Ms. Tanner respectfully requests that the Board reverse the ALJ's decision in this case to deny Ms. Tanner's benefits. In the alternative, she requests that she be granted another hearing so that the parties can review the new photographic evidence.

DATED this 6<sup>th</sup> day of June, 2010.

**HOLLINGSWORTH LAW OFFICE, LLC**

A handwritten signature in cursive script, appearing to read "April L. Hollingsworth", written over a horizontal line.

April L. Hollingsworth  
Attorney for Emilie Tanner

ADDENDUM E

TANNER

