

2010

# Jeffrey S. Record v. Workforce Appeals Board, Utah Department of Workforce Services and Zions First National Bank : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JEFFREY S. RECORD,

Petitioner,

PETITIONER'S OPENING BRIEF

vs.

Case No. 20100719-CA

WORKFORCE APPEALS BOARD,

UTAH DEPARTMENT OF

WORKFORCE SERVICES, and

ZIONS FIRST NATIONAL BANK,

ALJ Decision No. 10-A-04727

Workforce Appeals Board Nos. 10-B-  
00671&10-R-00860

Respondents.

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On Review from a Final Order

of the Utah Department of Workforce Services, Workforce Appeals Board

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF PRIOR OR RELATED APPEALS**

This Court should be aware that Mr. Record's coworker, Emilie Tanner, who was implicated in the same wrong-doing for which he was terminated, has also filed an appeal of the Workforce Appeals Board's decision to deny her unemployment benefits, Case No. 20100755-CA. As the facts and issues raised in these appeals are very similar, the Court should consider them together.

## **STATEMENT REGARDING JURISDICTION**

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-103(2)(a) because this is an appeal from a decision of an administrative agency.

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Should the Board have allowed the photographs to be introduced as new evidence in Mr. Record's appeal of the Administrative Law Judge's decision?

Proper application of the Employment Security Act and the relevant rules is reviewed with "only moderate deference." *Ekshteyn v. DWS*, 2002 UT App. 74.

This issue was the basis of Mr. Record's additional submission in support of his appeal (R. 132-134<sup>1</sup>) and his Request for Reconsideration (R. 147-159).

2. Should the decision of the ALJ be reversed based on the photographic evidence introduced?

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<sup>1</sup> Cites to page numbers in the record in this brief are designated by "R. page number."

The Court will reverse an administrative agency's findings of fact “only if the findings are not supported by substantial evidence.” *Rowley v. DWS, WAB*, 2009 UT App 371.

This issue was the basis of Mr. Record’s additional submission in support of his appeal (R. 132-134) and his Request for Reconsideration (R. 147-159).

3. Should the case be remanded for a new hearing to consider the photographic evidence?

Proper application of the Employment Security Act and the relevant rules is reviewed with “only moderate deference.” *Ekshteyn v. DWS*, 2002 UT App. 74.

Remand was proposed as an option to reversal in Mr. Record’s Request for Reconsideration (R. 147-159).

4. Did the ALJ err in excluding the testimony of one of Mr. Record’s witnesses, David Ratliff?

Proper application of the Employment Security Act and the relevant rules is reviewed with “only moderate deference.” *Ekshteyn v. DWS*, 2002 UT App. 74.

Mr. Record repeatedly asked to introduce Mr. Ratliff during his unemployment hearing. R. 61:27-40; 69:16-18; 81:36; 82:14, 30. The ALJ discouraged Mr. Record from introducing Mr. Ratliff. R. 88-89; 94:19.

5. Did the ALJ err in excluding documents that Mr. Record sought to introduce during the unemployment hearing?

Proper application of the Employment Security Act and the relevant rules is reviewed with “only moderate deference.” *Ekshteyn v. DWS*, 2002 UT App. 74.

Mr. Record preserved this issue for appeal at the very beginning of the unemployment hearing. R. 25:12-16. The ALJ stated that the issue would be addressed “during the exhibit portion,” but it was not revisited. R. 25-29.

### **STATUTES DETERMINATIVE OF THE APPEAL**

Resolution of this case necessarily involves application of Utah Code Ann. § 63G-4-403(4), which provides as follows:

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

\* \* \*

(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;

\* \* \*

(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;

\* \* \*

(iv) otherwise arbitrary or capricious.

### **STATEMENT OF THE CASE**

This is an appeal from a decision of the Appeals Board of the Utah Department of Workforce Services denying benefits to the Claimant, Jeffrey Record. The basis for Mr. Record’s termination is that one of his coworkers, Brandy Hanson, claimed to have seen him unclothed in a file room with another Zions employee, Emilie

Record, on February 19, 2010. It is undisputed that the only first-hand witnesses to what happened in the file room are Mr. Record, Ms. Tanner, and Ms. Hanson. Both Ms. Tanner and Mr. Record testified that they engaged in a work-related discussion in the file room and were not engaged in any improper conduct. Ms. Hanson, however, testified that she stood in the doorway of the file room to blow her nose, and saw Mr. Record and Ms. Tanner pulling on their clothes. It is undisputed that Mr. Record and Ms. Tanner were in the back corner of the file room during the incident in question. Two other Zions' witnesses, Deborah Battista and David Hinds, testified that one could see clearly from the doorway of the file room to the back corner where it is undisputed that Mr. Record and Ms. Tanner were when Ms. Hanson entered the room. Mr. Record disputed this, and tried to explain that the shelving in the room blocked the view from the doorway, such that Ms. Hanson could not have seen what she claimed to have seen.

David Hinds met with Mr. Record following the incident on February 19, 2010. Mr. Hinds and Mr. Record have different versions of what each person said during that meeting. A third person, David Ratliff, was present at the meeting. Mr. Record attempted to introduce the testimony of Mr. Ratliff at the hearing regarding the substance of the meeting between Mr. Record and Mr. Hinds, but the ALJ discouraged Mr. Record from calling Mr. Ratliff as a witness. Mr. Record also sought to introduce documents to support his claims, but the ALJ determined they were not necessary.

To establish that an employee was discharged for just cause and not entitled to unemployment insurance benefits, Employers bear the burden of showing: 1) the employee was culpable, meaning the that the employees conduct was so serious that

continuing the employment relationship would jeopardize the employer's rightful interest; 2) the employee had knowledge of the conduct the employer expected; and 3) the employee's conduct causing the discharge was within the employee's control. *See* Utah Code Ann. § 35A-4-405(2)(a); Utah Admin. Code R994-405-202(1)-(3). The ALJ ruled that Respondent Zions had carried its burden regarding its action to fire the Claimant for just cause, effectively finding that Zions' witnesses were more credible than Mr. Record and Ms. Tanner. Mr. Record appealed this decision to the Workforce Appeals Board.

After the hearing, Mr. Record was able to gain access to the file room to take photographs of it, pursuant to a demand by his attorney as part of a defamation case he filed against Ms. Hanson. R. 153-154. The photographs show the extent to which the shelving blocks the view of the back of the room. R. 132-134. In fact, one of the photographs was taken while Mr. Record sat where he was sitting when Ms. Hanson walked in the room, but he is not visible in the photograph. R. 133. Mr. Record asked the Board to review the photographs to assess Ms. Hanson's credibility. R. 132. The Board declined to accept the photographs as evidence, and additionally, ruled that even if they had been accepted, they would not change the outcome of the case. R. 149-142.

Mr. Record hereby appeals the Board's decision not to allow the photographs as additional evidence. He also appeals the Board's determination that the photographs would not change the decision denying him benefits. Finally, he appeals the ALJ's decision to exclude the testimony of Mr. Ratliff, as his testimony would go to the credibility of Mr. Hinds, and certain documents that he sought to admit in the hearing.

## **STATEMENT OF FACTS**

1. Mr. Record was terminated from his job with Zions Bank on or about Monday, February 22, 2010. R. 31:34-41. He had worked for Zions for 14 years as a Lending Information System Administrator. R. 29:32-40.
2. Mr. Record was not informed specifically of why he was terminated until he sought unemployment benefits after his termination. R. 70:13-25.
3. DWFS denied Mr. Record's initial request for unemployment benefits on the following basis: "Based on the best available information, the clmt was discharged for having a personal relationship with a co-worker based on the preponderance of evidence." R. 16.
4. Mr. Record requested that Zion provide certain documents to him prior to the hearing in this matter. R. 25.
5. The ALJ determined that the documentary evidence was not necessary for the hearing. R. 25.
6. At the unemployment hearing, Zions' Vice President of Human Resources, Deborah Battista, testified that, "On Friday, February 19th, 2010, at approximately 10:30 a.m., an employee had witnesses he – Jeff Record, and another employee, Emilie Tanner, together in a dark back room behind the mailroom." R. 30:10-15.
7. Ms. Battista testified that the file room at issue is an "unused . . . large area . . . behind the mailroom . . . [with] just a security light that is always on." R. 35:34-36. She testified that the "door remains open" in that room. R. 35:34.

8. It is undisputed that the file room was open during the incident in question (R. 48:34-36) and that the security lights are always on (R. 74:1).
9. Ms. Battista testified that she had gone into the file room at issue on the day of the hearing, and although “it is really dark” in the corner where “we believed that” Mr. Record and Ms. Tanner were in the room, “when you flip a light switch on you can see very clearly.” R. 36:4-8.
10. Ms. Battista testified that she was not at the office on February 19, 2010 (so obviously was not a witness to the events at issue). R. 30.
11. Ms. Battista conducted the termination meetings with Mr. Record and Ms. Tanner on February 22, 2010. R. 31:34-41.
12. At the time she terminated Mr. Record, she informed him that he was being terminated for “creating a hostile work environment,” but did not inform him about the allegations against him “about what happened in that room.” R. 41:1-14.
13. Ms. Battista testified that it was her understanding that Mr. Record admitted to “this incident” to David Hinds. R. 32:9-11.
14. David Hinds is the Executive Vice President of Zions. R. 54:37. He had no personal knowledge of the incident for which Mr. Record was terminated or any other inappropriate behavior on Mr. Record’s part. R. 66:25-28.
15. Mr. Hinds testified that he had spoken to Mr. Record on February 19 about the incident, and “just asked him if he was in the file room with Ms. Tanner,” and that Mr. Record acknowledged that he had been in the room with Ms. Tanner. R. 55:4-22. Mr. Hinds testified that when he met with Mr. Record, he was not concerned at

the time with why Mr. Record was in the file room with Ms. Tanner, but merely the fact that he was in the room with her. R. 60:9-19; 68:23-25.

16. Zions offered Mr. Hinds as a witness to his meeting with Mr. Record regarding the incident. R. 53:1-4. The ALJ determined that “I do think that testimony would be good to hear.” R. 53:6.
17. David Hinds and David Ratliff were both present during Mr. Hinds’ meeting with Mr. Record after the alleged events. R. 30:43-44; 31:29-32.
18. Brandy Hanson testified that on February 19, 2010, she “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 heard some rustling around. Flipped on the lights and saw Jeff and Emilie. Jeff jumped up, pulled his pants up. Emilie did the same.” R. 44:7-16. She testified that she waited outside the room to “make sure it was who it was that I saw,” and then went to her manager’s office to report it. R. 44:17-23.
19. Ms. Hanson testified that Mr. Record and Ms. Tanner “were in the very back of the room.” R. 44:28.
20. Ms. Hanson testified that “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.” R. 44:36-37. She testified that they were sitting on a chair. R. 47:1-3.
21. Ms. Hanson testified that she saw the “flesh” of Mr. Record’s leg. R. 49.
22. Ms. Hanson testified that it was not hard to see who was sitting in the back of the room. R. 44:39-42.

23. Ms. Hanson relied upon a diagram Mr. Record submitted as an exhibit for the hearing (R. 19) that showed the room, and testified that Mr. Record and Ms. Tanner were “in the back right corner where – at those carts” and that she was standing “in the doorway.” R. 45:24-36.
24. Ms. Hanson and Mr. Hinds both testified that the diagram submitted as Exhibit 19 was accurate. R. 46:6; 56:26-37.
25. Ms. Hanson testified that although there were shelves between her and Mr. Record and Ms. Tanner (she acknowledged that there were “three, four, or five, somewhere around there” sets of shelves rows of shelves in the room (R. 46:3-7)), she could still see them because “The shelves are empty so you can see right through them.” R. 45:38-41.
26. Mr. Ratliff was present during the meeting on February 19 between Mr. Hinds and Mr. Record. R. 55:27-30.
27. Mr. Record sought to introduce Mr. Ratliff as a corroborating witness because his version of the February 19 meeting differed from Mr. Hinds’ version of the meeting. R. 61:27-40; 69:16-18; 81:36; 82:14, 30.
28. David Ratliff drafted one of the exhibits to the hearing, which stated that Mr. Record and Ms. Tanner had work-related reasons to meet, and that Mr. Record’s cell phone calls during work were not improper. R. 20.
29. The ALJ discouraged Mr. Record from introducing Mr. Ratliff. R. 88-89; 94:19.

30. During the hearing, the ALJ allowed Mr. Hinds to remain as part of the hearing after he testified as a witness, and even to begin questioning Mr. Record during the hearing. R. 80:23-81:23.
31. Approximately one month before his termination, Mr. Record's office that he had had for about eight years was taken away from him. R. 71:34-36. Also, Ms. Tanner had just been demoted. R. 77:6-9.
32. Mr. Record testified that he was having a business-related conversation with Ms. Tanner in the file room on the day in question, and that nothing inappropriate occurred between them then or ever. R. 73:19-39; 75:15-22.
33. Mr. Record testified about the set up of the file room and the shelving, in an attempt to explain that someone of Ms. Hanson's height standing in the doorway of the room could not see people at floor level in the back of the room because of all the shelving. R. 74:26-38.
34. Ms. Tanner, likewise, testified that she and Mr. Record had a business-related conversation in the file room on February 19, 2010. R. 83-84. She testified that she was standing at least a foot or two away from Mr. Record during the conversation. R. 20-23.
35. The ALJ affirmed the initial decision of DWS denying benefits to Mr. Record. R. 97-100.
36. On June 15, 2010, Mr. Record provided photographs taken on June 14, 2010 of the file room where the incident at issue took place, from the doorway where Ms. Hanson said she stood when she witnessed the incident. R. 50:29-35; 132.

37. Mr. Record provided a photograph in which he was sitting on the cart described in the hearing; he is not visible at all in this photograph. R. 132-133.
38. The photographs show that shelving obstructing the view of the back corner of the room. R. 133-134.
39. The WFS Appeals Board upheld the decision of the ALJ. R. 137-145. The Appeals Board stated that it would not disturb the ALJ's finding that Mr. Record had his pants down in the file room. R. 139.
40. Regarding the photographs Mr. Record presented on June 15, the Board stated the following: "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." R. 142.
41. The Board also stated, "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." R. 142.
42. Regarding Mr. Record's argument that he should have been allowed to introduce testimony from Mr. Ratliff, the Board stated that Mr. Ratliff's testimony was not

relevant because “The discharge was based on the conduct in the file room, not what occurred in Mr. Hind’s office. The Claimant has failed to show how any witness or any documents would be relevant to the issue in this matter.” R. 142.

43. Mr. Record filed a Request for Reconsideration with the Board, arguing that the photographs were not available to him prior to the hearing, and explaining the circumstances under which he was able to obtain the photographs (upon the demand of his attorney after he filed a lawsuit against Ms. Hanson for defamation, and Zions immediately began tearing apart the file room). R. 147-159.
44. Mr. Record also objected to the Board’s finding that the area where he and Ms. Tanner were was visible in the photograph. R. 147-159.
45. The Board granted Mr. Record’s request to reconsider its position, but nonetheless upheld its original decision. R. 164.
46. As to the issue of whether the photographs should be admitted as additional evidence, the Board upheld its prior decision not to admit the photos, reasoning that “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.” R. 164.

47. The Board also reiterated its prior determination that the photographs would not have changed its decision. The Board determined that even if Mr. Record was sitting where he sat when Ms. Hanson walked into the file room and could not be seen in the photograph, “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 all 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.” R. 164.

### **SUMMARY OF THE ARGUMENT**

The Board has the ability to consider new evidence on appeal, in certain circumstances. The Rule at issue states, “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.” R994-508-305.

Assuming this Rule is not simply theoretical, and that there are some circumstances under which the Board can and should consider new evidence, the Board should have considered the photographs on appeal in this case. It is difficult to imagine a situation that fits the requirements of “unusual or extraordinary circumstances” and evidence that was unavailable at the hearing better than this one.

The Board found nonetheless that the photographs would not have changed the Board's decision because, "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." R. 142. This is a factual determination that is not supported by the record.

The Board addressed Mr. Record's claim that he was not allowed the opportunity to present certain documents and witnesses at the hearing. R. 142. The Board found that Mr. Ratliff was not relevant to the proceedings because he had no knowledge of what occurred in the file room. R. 142. While this is true, Mr. Ratliff could potentially have contradicted Mr. Hinds' account of his meeting with Mr. Record, thereby casting doubt on Mr. Hinds' credibility. Had the ALJ had a basis for doubting Mr. Hinds' credibility, it could have affected the outcome of the case, and therefore, the testimony should have been allowed.

The Board ultimately found that the "Claimant has failed to show how any witness or an documents would be relevant to the issue in this matter." R. 142. Mr. Record submits that in light of all the circumstances, he should have had the opportunity to present evidence that affected the credibility of Zions' witnesses.

## **ARGUMENT**

### **I. THE BOARD ERRED IN NOT CONSIDERING THE PHOTOGRAPHS ON APPEAL**

The Department of Workforce Services' administrative rules state that "[a]bsent 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." *Lopez v. Workforce Appeals Board, et al*, 2006 UT App. 411 (Utah App. 2006), citing Utah Admin. Code R994-508-305(2) (2005).

There is no case law, it seems, to provide guidance as to when the Board shall consider new evidence, but this Rule implicitly, if not explicitly, provides that there are circumstances in which it is appropriate for the Board to consider new evidence. The Rule limits these circumstances to those that are unusual or extraordinary circumstances, and where the evidence at issue was not available during the hearing. It is difficult to imagine what might qualify as an unusual or extraordinary circumstance if not the one presented by this case. Here, Mr. Record did not know the specific allegations for which he was terminated until he filed for unemployment benefits. At the unemployment hearing, Ms. Hanson did not dispute that Mr. Record and Ms. Tanner were in the back corner of the file room at issue, but she testified that she could see clearly to where Mr. Record and Ms. Tanner were in the room, and that she saw them trying to put their clothes back on. Ms. Battista also testified that one could see clearly from the doorway of the file room to the back corner of the room.

After the unemployment hearing, Mr. Record sued Brandy Hanson for defamation. Only then, through his attorney, did Mr. Record gain access to the file room at Zions where the incident at issue took place to take photographs of it. The photographs provide objective evidence to show that the view from the doorway of the room to the back corner was obstructed by shelving, so they were obviously relevant to this proceeding.

The Board did not consider whether this was an unusual circumstance that merited considering new evidence. Rather, the Board refused to consider the evidence on the basis that it determined, without relying on any specific evidence, that Mr. Record should have gotten photographs before the hearing. This speaks to the second criteria presented by the Rule regarding considering new evidence, as the Rule provides that new evidence will not be considered if it was “reasonably available and accessible” during the hearing before the ALJ. Here, the photographic evidence simply did not exist at the time of the hearing, so it obviously was not available or accessible. Mr. Record testified to the same information conveyed by the photographs – that Ms. Hanson could not have seen through the shelving as she claims. It is not reasonable to suggest that he should have foreseen that both Ms. Hanson and Ms. Battista would testify that one could see clearly from the doorway of the room to the back corner. Moreover, the fact that the ALJ did not allow Mr. Record to obtain certain documents from Zions (it is not clear from the record what these documents were, just that the ALJ did not allow them), suggests that she was not inclined to require Zions to provide information to Mr. Record. Finally, the circumstances under which Mr. Record did obtain the photographs (through a demand by his attorney), along with a common sense understanding of the relationship between employers and former employees, suggest Zions would not have simply allowed Mr. Record to come film its premises. It is therefore not reasonable for the Board to suggest that Mr. Record should have foreseen the need for photographic evidence of the visibility of certain areas of the file room and take the steps to obtain that evidence.

It should be pointed out that the Board had several options regarding what to do with the photographic evidence. The Board may affirm, reverse, modify, or remand a case to an ALJ. *See* Utah Code Ann. § 35A-1-304(2)(a)-(c) (2001). Accordingly, if the Board was concerned about the due process rights of Zions in addressing the evidence, it could simply have remanded the case for an additional hearing to address the issue.

## **II. THE BOARD ERRED IN FINDING THAT THE PHOTOGRAPHS WOULD NOT CHANGE THE OUTCOME OF THE DECISION**

Mr. Record submits that the photographs present evidence that is clear enough and strong enough to warrant a reversal of the ALJ's decision, without providing a new hearing. The ALJ determined that Mr. Record had his pants down when Ms. Hanson entered the file room on February 19, 2010. The only competent evidence of this was Ms. Hanson, who testified that she could see clearly across the room. The photographs demonstrate that Ms. Hanson's claim as to the unobstructed view is patently false, and therefore, given that it is the employer's burden to show that the employee engaged in wrongful conduct, this Court need go no further than to determine that Zions cannot meet this burden. When viewed in its totality, the evidence (including the photographs) does not support the ALJ's determination as to credibility or the events for which Mr. Record was terminated. Accordingly, the Board's decision should be reversed. *Eagala, Inc. v. Department of Workforce Services, et al*, 2007 UT App 43 (Utah App. 2007).

The Board's determination that the photographs would not affect the outcome of this case is simply inexplicable. As pointed out in Mr. Record's Request for Reconsideration, the Board seems to have ignored Mr. Record's claim that when the

photo he presented to the Board was taken, he was actually sitting where he was sitting when Ms. Hanson walked in the file room. In its final decision, the Board used different reasoning, relying on testimony from Ms. Tanner's unemployment hearing, in which she said that she could see Ms. Hanson through the shelves. From this testimony, the Board deduced that Ms. Hanson could therefore have seen Ms. Tanner and Mr. Record. It is an obvious principle that Person X behind several barriers can see through an opening such as a crack or a peephole to view an entire Person Y on the other side, but Person Y on the other side would not have the same view of Person X. Person Y, in fact, may have only a direct line of sight to the pupil of Person X's eye, which would not necessarily be visible to Person Y. It is not fair or just to make a decision so important as disallowing potentially exonerating photographic evidence based on the flawed finding that if Ms. Tanner could see Ms. Hanson, then Ms. Hanson could see Ms. Tanner, regardless of what the photographs indicate.

The Board also reasoned that Ms. Tanner could see Ms. Hanson because all of the shelves are aligned at the same height. This conclusion is similarly flawed. The conclusion that all of the shelves are at the same height is a finding of fact that is inappropriate for the Board to make without any evidence to support it. At any rate, regardless of the height of the shelves, the photographs make clear that one cannot see clearly from the doorway to the back corner of the file room, which should be sufficient to cast doubt on Ms. Hanson's credibility, thereby showing that Zions did not meet its burden of proof.

### **III. THE BOARD ERRED IN AFFIRMING THE ALJ'S DECISION TO EXCLUDE MR. RATLIFF AS A WITNESS AND CERTAIN DOCUMENTS**

The ALJ did not allow Mr. Record to obtain certain documents to present at the hearing, and also did not allow him to introduce Mr. Ratliff to testify regarding the conversation between Mr. Hinds and Mr. Record on February 19, 2010.

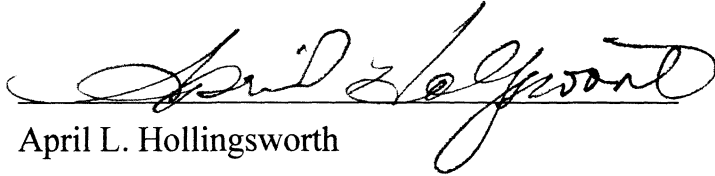
It is not disputed that the crux of the issue presented in this case is what happened in the file room between Mr. Record and Ms. Tanner, and what Ms. Hanson saw or could have seen. There are no documents that can speak to this issue, of course, and Mr. Ratliff could not speak to what Ms. Hanson saw in the file room. Nonetheless, since the ALJ's decision turned on a credibility assessment of the various witnesses, Mr. Record should have had the opportunity to attack their credibility. Instead, he had only his word to contradict what the witnesses stated, which the ALJ obviously did not credit appropriately.

### **CONCLUSION**

For the foregoing reasons, Mr. Record respectfully requests that the decisions of the ALJ and the Workforce Appeals Board be reversed and Mr. Record be awarded unemployment benefits. In the alternative, he requests that his case be remanded for an additional hearing to address the new evidence and that evidence that was improperly excluded from the first hearing.

DATED this 27<sup>th</sup> day of December, 2010.

**HOLLINGSWORTH LAW OFFICE, LLC**

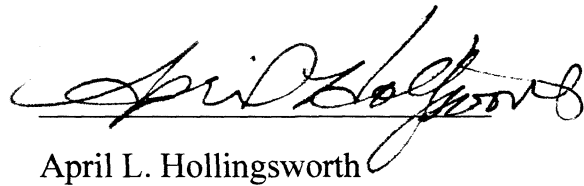


April L. Hollingsworth  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of December, 2010, a copy of the foregoing **PETITIONER'S OPENING BRIEF** was mailed first class, postage prepaid to:

Suzan Pixton  
Workforce Appeals Board,  
Department of Workforce Services  
P.O. Box 45244  
Salt Lake City, UT 84145-0244



April L. Hollingsworth

## **ADDENDUM**

Exhibit A -- Decision of the Administrative Law Judge

Exhibit B -- Decision of the Workforce Appeals Board

Exhibit C -- Decision of Workforce Appeals Board (Reconsideration)

# **EXHIBIT A**

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.



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Alexandra Nigh  
Administrative Law Judge  
DEPARTMENT OF WORKFORCE SERVICES

Issued: **April 22, 2010**

AN/ap

# **EXHIBIT B**

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

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:

**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.

(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

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

XXX-XX-0365  
Jeffrey S Record

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

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63-46b-16 of the Utah Administrative Procedures Act, and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

*[Handwritten signature]*  
*[Handwritten signature]*

Date Issued June 17, 2010

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10-B-00671

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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

# EXHIBIT C

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

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

WORKFORCE APPEALS BOARD

Date Issued August 4 2010

TV/TL/WS/AN/SP/lf

