

2012

Ranae Nicol v. Wells Fargo Bank : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RANAE NICOL,

Petitioner,

v.

Case No. 20120176-CA

WORKFORCE APPEALS BOARD
OF THE UTAH DEPARTMENT OF
WORKFORCE SERVICES, and
WELLS FARGO BANK,

Priority No. 7

Respondents.

BRIEF OF RESPONDENT

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

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**FILED
UTAH APPELLATE COURTS**

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JURISDICTION OF THE COURT OF APPEALS

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

ISSUE PRESENTED FOR REVIEW

Was the Workforce Appeals Board's decision that the Claimant was discharged for just cause reasonable, rational, and supported by substantial evidence in the record?

STANDARD OF REVIEW

The question of whether the Employer had just cause to discharge the Claimant is a mixed question of law and fact under the Utah Administrative Procedures Act. *Johnson v. Department of Emp't Sec.*, 882 P.2d 965, 968 (Utah Ct. App. 1993). When reviewing an agency's application of the law to a particular set of facts, the Court gives a degree of deference to the agency and will uphold the Board's decision so long as the decision is "within the realm of reasonableness and rationality." *EAGALA, Inc. v. Department of Workforce Servs.*, 2007 UT App. 43, ¶43. The Board's findings will be reversed "only if the findings are not supported by substantial evidence." *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997).

Substantial evidence is "more than a mere scintilla of evidence . . . though something less than the weight of the evidence." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶35 (omission in original)

(internal quotation marks omitted). Stated differently, an administrative decision "meets the substantial evidence test when a reasonable mind might accept as adequate the evidence supporting the decision." *Id.* An agency's findings of facts are accorded substantial deference and will not be overturned if based on substantial evidence, even if another conclusion may be formed from the evidence. *See Prosper Team, Inc. v. Department of Workforce Servs.*, 2011 UT App. 246, ¶7, *citing Hurley v. Board of Review*, 767 P.2d 524, 526-27 (Utah 1988).

Moreover, this Court will "defer to the Board's assessment of conflicting evidence." *Albertsons, Inc. v. Department of Emp't Sec.*, 854 P.2d 570, 575 (Utah Ct. App. 1993). It is not the court's "role to judge the relative credibility of the witnesses." *Id.* "It is the province of the Board, not the 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.*

STATUTES AND REGULATORY PROVISIONS AT ISSUE

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

§35A-4-405(2), Utah Code Annotated
§35A-4-508(8)(a), Utah Code Annotated
§63G-4-403, Utah Code Annotated
§78A-4-103, Utah Code Annotated
R994-405-202, Utah Administrative Code
R994-405-208, Utah Administrative Code

STATEMENT OF THE CASE

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

This is an appeal from an unemployment compensation decision by the Workforce Appeals Board (Board) of the Department of Workforce Services (Department).

The Claimant, Ranae Nicol, filed a claim for unemployment insurance benefits after the Employer, Wells Fargo Bank, terminated her employment. On November 14, 2011, the Department issued a decision finding the Claimant had been discharged from her employment with just cause and was therefore ineligible for benefits under the Utah Employment Security Act, Utah Code Ann. §35A-4-405(2)(a). (All Utah Code provisions are found sequentially at Addendum A, Department decision at Addendum B).

The Claimant appealed the Department decision to an Administrative Law Judge (ALJ). After an evidentiary hearing at which the Claimant and Employer were present, the ALJ determined the Employer met its burden to prove it discharged the Claimant for just cause under Utah Code Ann. §35A-4-405(2). (Addendum C). The Claimant subsequently appealed that decision to the Workforce Appeals Board. The Board upheld the decision of the ALJ. (Addendum D). The Claimant then requested reconsideration of the Board's decision, which the Board denied. (Addendum D). The present petition for review ensued.

B. Statement of the Facts.

The Board supplements and corrects the Employer's Statement of the Facts as follows:

The Claimant worked for the Employer as a banker from June 14, 2010, until she was discharged on October 31, 2011. (Record, 026: 9-10). The Employer's policy describes incidents of serious misconduct it considers sufficiently egregious so as to justify immediate discharge. (R, 012; 028: 6-10). The policy states that the Employer's customers and employees expect "adherence to high standards of integrity, honesty, and trust" as outlined in the policy. (Id.). Pursuant to the policy, employees are prohibited from handling or approving transactions on their own accounts or accounts of family members. (R, 013). This includes reversing service charges or fees. (Id.). The Claimant received a copy of this policy on June 14, 2010, and signed an acknowledgement that she understood she could be terminated immediately for violating the policy. (R, 015; 029: 15-18).

The Claimant maintained a joint account with her son. (R, 030: 41-44; 031: 1-11). Sometime toward the end of September 2011 she noticed a \$10 fee and a \$35 overdraft fee on the account while she was assisting another customer. (R, 031: 19-24). The Claimant thought the fees should not have been added to the account based on the nature of the account. (R, 031: 21-23). The \$10 fee directly related to the overdraft fee. (R, 033: 32-39).

The Employer expects employees who are disputing a fee on their account to contact customer service as any customer would. (R, 027: 25-28). It is not acceptable for an employee to reverse the fee personally. (R, 013; 027: 25-28). The Claimant, however, approached a supervisor about the fee. (R, 031: 22-25; 032: 1-16). The supervisor told the Claimant that if she reversed the fee on her own she did so at her own risk. (R, 031:

23-44; 032: 13-16, 42-44). The Claimant could have called the Employer's customer service department and asked for the fees to be reversed or instructed her son to do so. (R, 027: 38-40). Rather than contacting customer service, however, the Claimant reversed the fees herself. (R, 033: 32-33). The Employer later audited the transaction and discharged the Claimant for reversing the fees herself. (R, 028: 23-24).

SUMMARY OF ARGUMENTS

The Board correctly determined the Employer established just cause for its decision to discharge the Claimant. The Employer established that its legitimate interests were threatened by the Claimant's willful violation of its policy, that she knew her conduct was expressly prohibited by the policy, and that she had the requisite control over the conduct that led to her discharge. The Board's decision to deny benefits is reasonable and rational. It is supported by substantial evidence in the record and this Court should deny the Claimant's appeal.

On appeal to this Court, the Claimant argues the Employer failed to establish the element of culpability and thus failed to establish just cause for its decision to discharge her. She does not appear to challenge the Board's determination that the Employer satisfied the elements of knowledge and control, arguing instead that the Employer failed to establish that its interests were so threatened by her conduct that it justified her immediate discharge

The Employer, however, demonstrated that the Claimant willfully violated a known, reasonable policy in reversing the fees on the account she shared with her son.

The policy exists to ensure the Employer's employees adhere to the highest standards of integrity, honesty, and trust. When the Claimant ignored the policy she did so at her own peril, demonstrating dishonesty and a disregard for the Employer's interests it could not tolerate.

The Claimant also failed to marshal the evidence to show the Board's decision is not supported by substantial evidence, marshaling only the evidence supporting her contention that she was discharged without just cause and ignoring any evidence contrary to her desired outcome.

ARGUMENT

I. THE BOARD'S DECISION THAT THE EMPLOYER DISCHARGED THE CLAIMANT FOR JUST CAUSE WAS REASONABLE AND RATIONAL AND SHOULD BE UPHELD.

A claimant is eligible for unemployment benefits if discharged without just cause as defined in Utah Admin. Code R994-405-202. (*See* Addendum A). In establishing whether a claimant was discharged for just cause, the employer has the burden of proving: (1) the claimant's culpability, (2) the claimant's 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 Ct. App. 1992). The employer must establish each of the three elements in order for the claimant to be denied benefits. *Id.*, at 577. The Claimant was discharged for violating the Employer's policy regarding reversing fees on a personal account. An employer enjoys the prerogative to establish

and enforce rules that further its legitimate business interests. Utah Admin. Code R994-405-208. The Claimant violated such a rule in this instance.

Here, the Board found the Employer satisfied the necessary elements to establish just cause. The Board agreed with the Employer that a single violation of a known policy that was intended to demonstrate integrity, honesty, and trust sufficiently threatened the Employer's legitimate interests that it necessitated the Claimant's immediate discharge. The Claimant understood the policy and had received training in how to comply with the policy. She also sought advice from her supervisor and was told that if she personally reversed the fees on her account, in violation of the policy, she did so at her own risk.

A. The Employer Established the Element of Culpability

In order to demonstrate the element of culpability, the Employer must show the conduct causing the discharge to be so serious that continuing the employment relationship would jeopardize its legitimate interests. Utah Admin. Code R994-405-202(1). The Employer met its burden in this case.

The Claimant argues the Employer failed to establish just cause for its decision to discharge her. The Claimant argues that the ALJ and the Board erred in their analysis of the case by failing to balance the employee's circumstances against the harm to the Employer. The Claimant argues she is entitled to benefits under the balancing criteria outlined in *Gibson v. Department of Employment Security*, wherein the Court stated that a finding of culpability requires a "balancing of the employee's past work record, the employee's length of employment, and the likelihood that the conduct will be repeated

against the seriousness of the offense and the harm to the employer." *Gibson*, 840 P. 2d 780, 784 (Utah Ct. App 1992).

The Claimant argues specifically that she worked for the Employer for 16 months without incident, meaning her act of reversing fees was not a pattern of misconduct. The Claimant further argues her conduct would likely not reoccur, was not overly serious, and did not subject the Employer to actual harm. As such, the Claimant argues, the harm to the Employer and the seriousness of the conduct did not outweigh the Claimant's work history, length of employment, and the likelihood that her conduct would be repeated.

The Board, however, correctly balanced the factors in this case and determined the seriousness of the offense sufficiently jeopardized the Employer's legitimate interests such that it necessitated her immediate discharge. The culpability standard does not require actual harm to the employer, only potential harm. *Fieeki v. Dept. of Workforce Services*, 2005 UT App. 398, ¶3. The harm to the employer may be actual or potential, and potential harm may be shown from a single violation if that violation is sufficiently serious or harmful. *Id.* ¶¶3-4. In *Fieeki*, the Claimant, a law enforcement officer, was discharged after domestic violence charges against him were substantiated. The Court determined the Claimant's conduct was not an innocent mistake or an incident of poor judgment, but rather a "volitional act with consequences of which a law enforcement officer is, or should be, aware." *Id.*; ¶5; *see also Lane v. Board of Review*, 727 P. 2d 206, 211 (Utah 1986) ("the degree of culpability which will disqualify an employee from receiving benefits involves volitional acts by an employee who could not have been heedless of their consequences").

The Court further reasoned that while the rule states a single incident may not be sufficient to establish the element of culpability, the use of the word "may" in the rule "contemplates situations where potential harm could be shown from a single rule violation." *Id.*, ¶4, citing *Kehl v. Board of Review*, 700 P.2d 1129, 1134 (Utah 1985); see also Utah Admin. Code R994-405-202(1). As such, the Court reasoned, "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 interests.'" *Fieeki*, at ¶4.

The Claimant in this instance engaged in a dishonest, volitional act with consequences of which she could not have been heedless. The Claimant understood the Employer's policy that employees were prohibited from handling their own account, including reversing charges and fees. (R, 015; 032: 32-33; 035: 14-19). She received a copy of the Employer's policy and should have known the Employer considered a single violation of the policy to be sufficiently serious to warrant her discharge. (R, 012). The Claimant's position required her to act with a high degree of integrity and honesty. To this end the Employer promulgated a policy that prohibited employees from working on their own accounts. Indeed, the policy was intended to demonstrate integrity, honesty, and trust, both among employees and with the public, and to protect the Employer's financial and regulatory interests. If employees were allowed to work on their own accounts in a manner not available to the general public it could greatly damage the Employer's reputation with its customers and adversely affect the Employer's belief the Claimant performed her duties in an honest and transparent manner.

In this instance, the Board correctly determined the Claimant's conduct, though a single act, was sufficiently serious that it outweighed the Claimant's work history, the length of her time with the Employer, and the likelihood that it would happen again. The Claimant reversed fees on the account she shared with her son, willfully violating a known policy that she knew, or should have known, would result in her discharge. (R, 012; 013; 030; 41-44; 031: 1-11; 033: 32-33). She had been advised by her supervisor that she did so at her own peril. (R, 031: 23-44; 032: 13-16, 42-44).

The Claimant had only worked for the Employer for little more than a year. Though she had not violated the policy in her 16 months with the Employer, given her disregard for the Employer's policy there is no indication in the record she would not have violated the policy once more if she again found it inconvenient to follow the policy. The policy is reasonable and designed to protect the Employer's rightful interests. As such, regardless of how long the Claimant worked for the Employer, and regardless of whether she had ever been disciplined for this sort of conduct, the seriousness of the act coupled with the disregard for the Employer's policy and her disregard for her supervisor's warning, gave the Employer little option other than to discharge her.

The Board's finding that the Employer established the element of culpability was reasonable, rational, and supported by substantial evidence. As such, the Board's determination that the Employer established culpability should be upheld.

B. The Employer Established the Elements of Knowledge and Control

Though not challenged on appeal, the Board correctly determined the Employer also established the elements of knowledge and control. In order to establish the element

of knowledge, the Employer must show the Claimant understood the conduct the Employer expected. Utah Admin. Code R994-405-202(2). The Employer must also show the Claimant should have been able to anticipate the negative effect of her conduct. *Id.* To establish the element of control, the Employer must show the conduct causing the discharge was within the Claimant's control. Utah Admin. Code R994-405-202(3)(a).

The Claimant understood the Employer's expectations. She knew, or should have known, that the Employer's policy prohibited her conduct in this matter. (R, 012; 013). The Claimant had been trained on and received a copy of the policy, and had also acknowledged she understood the policy and knew she could be discharged for violating it. (R, 015; 029: 15-18). She knew she was prohibited from handling her own account in this manner and had been advised by her supervisor that she did so at her own peril. (R, 031: 23-44; 032: 13-16, 32-33, 42-44). When confronted by the Employer, the Claimant admitted she knew she was not supposed to handle her own account. (R, 035: 14-19). As such, she should have been able to anticipate the negative consequences that would result from reversing the fees on her personal account.

The Claimant was also in control of the conduct that led to her discharge. The Claimant was not forced to reverse the fees. She had other options. The Claimant could have contacted customer service and asked that the fees be reversed as would any customer. (R, 027: 25-28). Indeed, this is the Employer's expectation with regard to employee accounts. (*Id.*). The Claimant also could have asked her son to contact customer service to address the fees. She could have altered her conduct in a variety of ways in order to avoid being discharged.

The Board's determination that the Employer established the elements of knowledge and control was reasonable, rational, and supported by substantial evidence in the record.

II. THE EMPLOYER FAILED TO MARSHAL EVIDENCE IN SUPPORT OF ITS APPEAL.

In finding the Employer sustained its burden of proving the Claimant was 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 Claimant "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 her conclusion the findings were without foundation. The burden is an extremely heavy one and the Claimant has presented no evidence or arguments sufficient to overcome this burden.

In *Crockett v. Crockett*, 836 P.2d 818 (Utah 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 1042.

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

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

Then, after an appellant has established:

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

The Claimant here has not met her marshaling burden. She has pointed to no evidence in the record to show that the findings of the Board are so "against the clear

weight of the evidence" that they are "clearly erroneous." The record below is supported by the evidence and entitled to a presumption of validity. See also *Grace Drilling 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 *marshall* [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 Claimant in this case also failed to meet her marshaling burden.

CONCLUSION

The Court should find the substantial evidence in the record supports the Board's determination the Claimant was discharged for just cause and is therefore ineligible for benefits. The Employer successfully established the elements of culpability, knowledge, and control. The Claimant also failed to marshal the evidence in support of her appeal. The Board's decision was reasonable and rational. As such, the Board requests the Court deny the Claimant's appeal and affirm the Board's decision.

Respectfully submitted this 10th day of September, 2012.



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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

I CERTIFY that the foregoing Respondent's Brief complies with the type-volume limitations. It uses proportionally spaced typeface and contains 4,009 words.



Jason R. Maughan
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CERTIFICATE OF MAILING

I CERTIFY that I mailed two copies of the foregoing Respondent's Brief, postage prepaid, to the following this 10th day of September 2012.

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**Utah Workforce Services Code
Employment Security Act**

35A-4-405. Ineligibility for benefits.

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

(1) (a) For the week in which the claimant left work voluntarily without good cause, if so found by the division, and for each week thereafter until the claimant has performed services in bona fide, covered employment and earned wages for those services equal to at least six times the claimant's weekly benefit amount.

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

(c) Using available information from employers and the claimant, the division shall consider for the purposes of this chapter the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

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

(2) (a) For the week in which the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the division, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.

(b) For the week in which the claimant was discharged for dishonesty constituting a crime or any felony or class A misdemeanor in connection with the claimant's work as shown by the facts, together with the claimant's admission, or as shown by the claimant's conviction of that crime in a court of competent jurisdiction and for the 51 next following weeks.

(c) Wage credits shall be deleted from the claimant's base period, and are not available for this or any subsequent claim for benefits.

...

ADDENDUM A

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;

ADDENDUM A

(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.

Renumbered and Amended by Chapter 382, 2008 General Session

78A-4-103. Court of Appeals jurisdiction.

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

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

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

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

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63G-3-602;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 344, 2009 General Session

R994. Workforce Services, Unemployment Insurance.**R994-405. Ineligibility for Benefits.****R994-405-201. Discharge - General Definition.**

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

R994-405-202. 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. Workforce Services, Unemployment Insurance.

R994-405. Ineligibility for Benefits.

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

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

(1) Violation of Company Rules.

If a claimant violates a reasonable employment rule and just cause is established, benefits will be denied.

(a) An employer has the prerogative to establish and enforce work rules that further legitimate business interests. However, rules contrary to general public policy or that infringe upon the recognized rights and privileges of individuals may not be reasonable. If a claimant believes a rule is unreasonable, the claimant generally has the responsibility to discuss these concerns with the employer before engaging in conduct contrary to the rule, thereby giving the employer an opportunity to address those concerns. When rules are changed, the employer must provide appropriate notice and afford workers a reasonable opportunity to comply.

(b) If an employment relationship is governed by a formal employment contract or collective bargaining agreement, just cause may only be established if the discharge is consistent with the provisions of the contract.

(c) Habitual offenses may not constitute disqualifying conduct if the acts were condoned by the employer or were so prevalent as to be customary. However, if a claimant was given notice the conduct would no longer be tolerated, further violations may result in a denial of benefits.

(d) Culpability may be established if the violation of the rule did not, in and of itself, cause harm to the employer, but the lack of compliance diminished the employer's ability to maintain necessary discipline.

(e) Serious violations of universal standards of conduct do not require prior warning to support a disqualification.

UNEMPLOYMENT INSURANCE
DECISION OF ELIGIBILITY FOR
UNEMPLOYMENT INSURANCE BENEFITS

ADDENDUM B

DATE MAILED: 11/14/11

DCVP

RANAE NICOL
4445 W 4715 S
KEARNS UT 84118-4742

SSN: XXX-XX-X832
EMPLOYER: WELLS FARGO BANK

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

You were discharged from your job for not following a reasonable policy, rule or instruction from your employer.

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 October 30, 2011 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 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. Your appeal must be in writing and must be received or postmarked on or before November 29, 2011. An appeal received or postmarked after November 29, 2011 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.#: 1000562

DO NOT WRITE BELOW THIS LINE



Form APDEC
04DEPARTMENT OF WORKFORCE SERVICES
APPEALS SECTION

Decision of Administrative Law Judge

Appellant

RANAE NICOL
4445 W 4715 S
KEARNS UT 84118-4742

Respondent

WELLS FARGO BANK
%BARNETT ASSOCIATES INC
PO BOX 7340
GARDEN CITY NY 11530-0725

S.S.A. NO: XXX-XX-4832

CASE NO: 11-A-18336

APPEAL DECISION: The Department's decision is affirmed.
The Claimant is denied unemployment 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. The decision also relieved the Employer's benefit ratio account for benefits paid to the Claimant.

APPEAL RIGHTS: This decision will become final unless, within **30 days** from **December 7, 2011**, further written appeal is received by the Workforce Appeals Board (PO Box 45244, Salt Lake City, UT 84145-0244; FAX 801-526-9244; or online at <http://www.jobs.utah.gov/appeals>) setting forth the grounds upon which the appeal is made.

FINDINGS OF FACT:

Prior to filing a claim for unemployment benefits the Claimant worked as a banker for Wells Fargo Bank from June 14, 2010, through October 31, 2011. At the end of the employment the Claimant was earning \$15.24 an hour.

The Claimant received the Employer's policy and procedures. The Code of Conduct policy prohibited employees from handling transactions on their own accounts or account of relatives. The policy stated that reversing service charges or fees was not allowed on your own accounts or that of relatives.

At the end of September 2011, the Claimant noticed that the joint account she shared with her son had a \$10 fee and a \$35 overdraft fee on the account. The Claimant asked a supervisor about the fees on her son's account. The Claimant expressed that there should not be the \$10 service fee because it was a member's account and that if the fee would not have been charged, the account would have not been overdrawn and the overdraft fee would have not been assessed. The supervisor told her that that she could reverse the fees but she would do it at her own risk. She could have called the customer service account line as any other customer would to request the fees be reversed. The transaction was audited and the Claimant was discharged for violating the policy.

REASONING AND CONCLUSIONS OF LAW:

Discharge

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) of the Utah Employment Security Act, there must be fault on the part of the employee involved. The unemployment insurance rules pertaining to Section 35A-4-405(2)(a) provide in pertinent part:

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.

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

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

(1) Violation of Company Rules.

If a claimant violates a reasonable employment rule and just cause is established, benefits will be denied.

(a) An employer has the prerogative to establish and enforce work rules that further legitimate business interests. However, rules contrary to general public policy or that infringe upon the recognized rights and privileges of individuals may not be reasonable. If a claimant believes a rule is unreasonable, the claimant generally has the responsibility to discuss these concerns with the employer before engaging in conduct contrary to the rule, thereby giving the employer an opportunity to address those concerns. When rules are changed, the employer must provide appropriate notice and afford workers a reasonable opportunity to comply.

(b) If an employment relationship is governed by a formal employment contract or collective bargaining agreement, just cause may only be established if the discharge is consistent with the provisions of the contract.

(c) Habitual offenses may not constitute disqualifying conduct if the acts were condoned by the employer or were so prevalent as to be customary. However, if a claimant was given notice the conduct would no longer be tolerated, further violations may result in a denial of benefits.

(d) Culpability may be established if the violation of the rule did not, in and of itself, cause harm to the employer, but the lack of compliance diminished the employer's ability to maintain necessary discipline.

(e) Serious violations of universal standards of conduct do not require prior warning to support a disqualification.

Culpability is established. The Employer had reasonable expectations for the Claimant to follow the Code of Conduct policy. The policy was in effect so that employees could not work on their own account. The Claimant working and reversing charges on her own account was harmful to the Employer. The fees were not investigated independently. The failure to follow the policy was harmful to the Employer's policy and ability to trust the Claimant. The Employer discharged the Claimant to avoid any further harm to its interests.

Knowledge is established. The Claimant knew or should have known the Employer's expectations. She knew the policy and was warned that reversing the fees was risky. She should have been able to anticipate the negative effect and possible consequences of her conduct based upon the statement by the supervisor.

Control is established. The Claimant had the ability to follow the Employer's expectations. Knowing that the Employer expected her not to handle transactions on her own accounts and having been warned it was risky, she should have refrained from working on her own account.

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

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(2) of the Utah Employment Security Act. The Claimant's separation is disqualifying, and the Employer is relieved of charges.

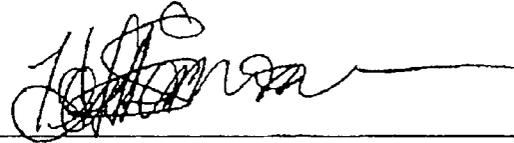
DECISION AND ORDER:

Discharge

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 October 30, 2011, and continuing 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.



Heather Simonson
Administrative Law Judge
DEPARTMENT OF WORKFORCE SERVICES

Issued: **December 7, 2011**

HS/tc

Form BRDEC
Issue 04

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

RANAE NICOL, CLAIMANT
S.S.A. No. XXX-XX-4832

:

:

Case No. 11-B-01808

WELLS FARGO 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 December 7, 2011, Case No. 11-A-18336, the Administrative Law Judge affirmed the Department decision and denied unemployment insurance benefits to the Claimant effective October 30, 2011. The Employer, Wells Fargo 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: December 16, 2011.

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.

11-B-01808

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XXX-XX-4832
RANAE NICOL**REASONING AND CONCLUSIONS OF LAW:**

The Claimant worked for the Employer as a banker from June 14, 2010, until she was discharged on October 31, 2011. The Employer's policy prohibits employees from handling transactions on their own accounts or the accounts of relatives. The policy specifically prohibits employees from reversing charges or fees on their accounts or the accounts of relatives. The Employer considers a single violation of this policy to be sufficient grounds for discharge.

The Claimant maintained a joint account with her son. Sometime toward the end of September 2011, she noticed a \$10 fee and a \$35 overdraft fee on the account. The Claimant did not feel the \$10 fee should have been added to the account because of the nature of the account. The \$10 fee directly resulted in the overdraft fee. The Claimant approached a supervisor about the fee. She claims she asked her supervisor if she could reverse the fee and was told that if she reversed the fee she did so at her own risk. The Claimant could have called the customer service department and asked for the fees to be reversed. Rather than doing so, however, the Claimant reversed the fee herself. The Employer later audited the transaction, discharging the Claimant when it discovered she had reversed the fee herself.

The Administrative Law Judge found that the Employer established just cause for its decision to discharge the Claimant.

The Claimant offers no substantive argument on appeal, arguing only that the Administrative Law Judge's decision was not supported by substantial evidence. The Claimant requested a copy of the transcript in order to prepare her written argument. She was sent a copy of the transcript on January 4, 2012, with a letter instructing her that her written argument must be submitted within ten days from the date of the letter. The Claimant's written argument was due by January 14, 2012, so that it might be considered by the Board when the Board convened on January 17, 2012, at 10:00 a.m. The Claimant's written argument was not faxed to the Board until January 17, 2012, at 8:37 p.m., well after the Board met to consider the Claimant's appeal. As such, the Claimant's written argument in support of her appeal was not considered in reaching this decision.

The unemployment insurance rules pertaining to §35A-4-405(2)(a) of the Utah Employment Security Act provide, in pertinent part:

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

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XXX-XX-4832
RANAE NICOL

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.

In order to establish just cause for a discharge, the Employer must satisfy all three elements of the just cause standard. Here, the Employer satisfied the necessary elements to show just cause.

To establish culpability, the Employer must show the Claimant's conduct was so serious that continuing their relationship would jeopardize the Employer's rightful interests. The Claimant was discharged for violating the Employer's policy regarding handling transactions on her own account. The policy exists to protect the Employer's financial and regulatory interests and it has a legitimate interest in its employees following the policy. The Employer considers compliance with the policy to be such a serious matter that it discharges employees for a single violation of the policy. Though the Claimant violated the policy only once, her conduct sufficiently jeopardized the Employer's interests that it necessitated her immediate discharge. The Employer established the element of culpability.

To establish the element of knowledge, the Claimant must have an understanding of the conduct expected by the Employer. The Claimant knew that reversing the charges on her own account was contrary to the Employer's expectations. The Claimant knew that she was prohibited from handling her own account and was specifically warned by her supervisor that she could reverse the charges on her account at her own risk. The Claimant also understood the Employer's policy and, when confronted by the Employer, admitted that she knew she was not supposed to handle her own account. The Claimant also specifically testified that she knew about the policy and decided to proceed despite her supervisor's warning that she did so at her own peril. She should have been able to anticipate the negative consequences that would result from reversing the fees on her account in violation of the Employer's policy. The Employer established the element of knowledge.

The Claimant was in control of the conduct that led to her discharge. She could have avoided being discharged in a variety of ways. The Claimant could have contacted the customer service department. She could have asked her son to contact the Employer or the customer service department. She also could have heeded her supervisor's warning and simply refrained from reversing the fees on her account. The Employer established the element of control.

The decision denying benefits is affirmed. The Board adopts the Administrative Law Judge's reasoning and conclusions of law in full.

DECISION:

The decision of the Administrative Law Judge denying unemployment insurance benefits to the Claimant effective October 30, 2011, under the provisions of §35A-4-405(2)(a) of the Utah Employment Security Act, is affirmed.

11-B-01808

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XXX-XX-4832
RANAE NICOL

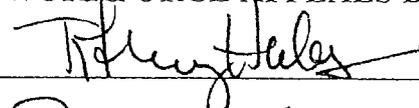
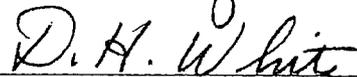
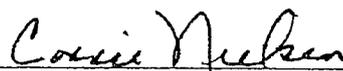
The Employer, Wells Fargo Bank, is eligible for relief of benefit charges in connection with this claim, as provided by §35A-4-307(1) of the Act.

APPEAL RIGHTS:

Pursuant to §63G-4-302(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 §63G-4-302(3)(b) of the Utah Administrative Procedures Act. **It is not necessary to file a request for reconsideration if you intend to appeal to the Utah Court of Appeals. 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; §63G-4-401 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: January 18, 2012

TH/CN/DW/HS/JM/cd

11-B-01808

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XXX-XX-4832
RANAE NICOL

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 18th day of January, 2012, by mailing the same, postage prepaid, United States mail to:

LORI JOHNSON
UTAH LEGAL SERVICES
205 N 400 W
SALT LAKE CITY UT 84103-1125

RANAE NICOL
4445 W 4715 S
KEARNS UT 84118-4742

WELLS FARGO BANK
C/O BARNETT ASSOCIATES
PO BOX 7340
GARDEN CITY NY 11530-0725

Connie Adams

Form BRDEC
Issue 04

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

RANAE NICOL, CLAIMANT
S.S.A. No. XXX-XX-4832

:

Case No. 12-R-00062

:

RECONSIDERATION

WELLS FARGO BANK,
EMPLOYER

:

DECISION OF WORKFORCE APPEALS BOARD:

The Claimant's request for reconsideration is denied.

HISTORY OF CASE:

In a letter received on January 20, 2012, the Claimant, Ranae Nicol, requested reconsideration of the decision of the Workforce Appeals Board issued in this case on January 18, 2012. 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 §63G-4-302(3) on the grounds that the Board's decision was final agency action within the meaning and intent of that section of law.

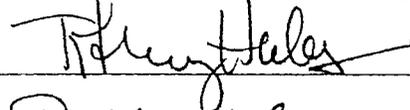
DECISION:

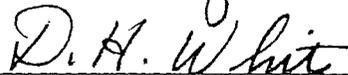
The Claimant's request for reconsideration is denied. The decision of the Workforce Appeals Board dated January 18, 2012, remains in effect.

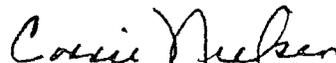
APPEAL RIGHTS:

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; §63G-4-401 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: February 8, 2012

TH/CN/DW/HS/JM/lf

12-R-00062

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XXX-XX-4832
Ranae Nicol

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 8th day of February, 2012, by mailing the same, postage prepaid, United States mail to:

RANAE NICOL
4445 W 4715 S
KEARNS UT 84118-4742

LORI JOHNSON
UTAH LEGAL SERVICES
205 N 400 W
SALT LAKE CITY UT 84103-1125

WELLS FARGO BANK
C/O BARNETT ASSOCIATES INC
PO BOX 7340
GARDEN CITY NY 11530-0725

L. Frolick

WELLS FARGO**INTERNET SERVICES GROUP****Human Resource Policy****Reasons for Immediate Involuntary Termination****SERIOUS MISCONDUCT**

As employees of Wells Fargo Bank (Bank), we are responsible for safeguarding confidential information relative to customers' (including fellow employees') finances. In addition, our customers and fellow employees expect adherence to high standards of integrity, honesty, and trust from the Bank. Employee responsibilities, Bank Policies, and Procedures addressing the handling of our business are outlined in the *Handbook for Wells Fargo Team Members and Handbook for Wells Fargo Supervisors* in the following sections:

- Code of Ethics and Business Conduct (Appendix A)
- Leaving Wells Fargo Involuntary Terminations (Chapter 9)

When reviewing these Handbooks, please pay special attention to the violations considered as "Serious Misconduct". The violations listed constitute grounds for immediate involuntary termination of your employment.

The Purpose of this document is to increase employee awareness and understanding of the actions that violate the Bank's existing policies.

If upon investigation, it is confirmed that you engaged in activities considered "Serious Misconduct" by the Bank/Group/Division, your employment may be immediately involuntarily terminated.

Examples considered acts of "Serious Misconduct" are listed below. Please review this document carefully. It is important to understand that the items below serve only as examples and do not encompass all of the reasons for immediate involuntary terminations.

Intentional Misuse of the Telephone

Listed below are actions considered as "Serious Misconduct". Examples of misuse occur when an employee deliberately:

- Disconnects a customer
- Transfers a call back into the queue without first acknowledging or servicing a customer
- Uses the Conference Button inappropriately
- Places a customer on hold then makes/engages in a personal call
- Makes or receives personal calls on job time

Also, Intentional Misuse of the Telephone to create a false statistical record (i.e., altering Average Handle Time statistics) represents an "Act of Dishonesty".

Transactions and Approval Policy Violations**Transactions**

Employees are not to handle or approve transactions on their own account(s), accounts of relatives or members of their household, including roommates and other unrelated individuals. Examples of these transactions are:

- Change of address
- Increasing ATM credit limits
- Changing overdraft (OD) limit codes
- Changing the number of OD occurrences
- Reversing service charges or fees, i.e., Pricing: Employees are not to view their own account(s) while logged onto the Pricing 309 screen, as to exit this screen requires them to "price their own accounts". Should you view your account(s) while logged on to Pricing, this action must be reported to a supervisor immediately.

As a courtesy, center employees are permitted to access their accounts for information purposes only within center guidelines.

Approvals

If a transaction requires approval, the approval must come from the next higher level of authority. An employee may not request approval of personal transactions by a peer or by a subordinate who reports to them. For example, a supervisor cannot ask another supervisor to reverse and/or approve their overdrafts and fees. The supervisor should ask their manager or any "next-higher-level" manager to do their transactions for them. An agent cannot approach another agent and ask them to reverse fees on their account(s). The agent should ask their supervisor or any "next-higher-level" supervisor to do their transaction for them. (These actions constitute "favors" for friends and co-workers).

Unauthorized Access to Account Records

To access a customer's account without their approval (including fellow employees, family members, and persons with whom there is/was personal involvement) for any reason (e.g., to obtain another employee's telephone numbers, birthday, address, etc.; to look up the account balance of a celebrity or another employee) is against Bank policy.

Automated Teller Machines (ATM) Transactions

Making fictitious ATM deposits to receive cash (e.g., empty ATM envelope deposits, depositing checks drawn against insufficient funds via the ATM, including on paydays prior to the availability of funds) is against Bank policy.

Submitting false ATM claims of any amount (including those under \$25.00 or less) is a violation of Bank policy as well as illegal. Although the Bank does not question these transactions as a matter of practice, reports of ATM claims are generated and reviewed by the Bank's Auditing Department. When trends are noted, they are investigated and, if confirmed, constitute "Fraudulent Activity".

False Bank Records (Personnel)

Falsifying timesheets or attendance records to get paid for time not worked is against Bank policy.

1 JONES I am a service manager.
2
3 JUDGE What was the claimant's job there?
4
5 JONES She was a banker.
6
7 JUDGE What were her dates of employment, the first date she worked and the last?
8
9 JONES Um her initial hire date was June the 14, 2010. Um the date that she was released
10 from the company was October 3st of 2011.
11
12 JUDGE Was she discharged from the job?
13
14 JONES Uh, yes she was.
15
16 JUDGE What was her rate of pay at the time of termination?
17
18 JONES At the time it was 15 dollars and 24 cents per hour.
19
20 JUDGE Why was she terminated?
21
22 JONES She was terminated for a violation of the code of ethics policy?
23
24 JUDGE What is the code of ethics policy?
25
26 JONES The code of ethics policy is, as indicated here in the exhibit, it basically covers
27 many different things but in particular, related to this case, would be crediting fees
28 back on your own personal account or that of a close family member.
29
30 JUDGE Okay, which exhibit is that?
31
32 JONES Let me look at it here, I have two copies here, I'm sorry. I believe it is—
33
34 HEBDA Judge Simonson, can I give the page number? Is that appropriate?
35
36 JUDGE Yes, go ahead.
37
38 CLAIMANT Page 13 is specific to the—under transactions.
39
40 JUDGE Which exhibit number? Is that Exhibit 13?
41
42 CLAIMANT It's Exhibit 13, that's what I meant. Yes, I'm sorry. It's the second page of the
43 policy but 13 is the number.
44

1 JUDGE Is that the policy you're referring to, Mr. Jones?
2
3 JONES Yes it is.
4
5 JUDGE Okay. So go ahead and read the policy she violated into the record.
6
7 JONES Okay it says on Exhibit 13 under Transactions, "Employees are not to handle or
8 approve transactions on their own accounts, accounts of relatives or members of
9 their household including roommates and other unrelated individuals. Examples of
0 these transactions are change of address, increasing ATM credit limits, changing
1 overdraft limit codes, changing the number of overdraft occurrences, reversing
2 service charges or fees—for example, pricing. Employees are not to view their own
3 accounts while logged into the pricing 309 screen as to exit this screen requires
4 them to price their own account. Should you view your accounts while logged into
5 this pricing, this action must be reported to your supervisor immediately."
6
7 And the one in question would be the initial listing reversing service charges or
8 fees.
9
0
1 JUDGE What occurred?
2
3 JONES Ranae was found to have reversed some service fees on her own personal account
4 or that of a relative. At the time it was discovered she was – she discussed the
5 matter with our internal investigator and at that time she admitted that she had
6 made those changes to her account which, as the policy states here, is not to be
7 done by an employee.
8
9 JUDGE And what was the fee that was reversed?
0
1 JONES I don't have the copies of the actual fees but it was a fee related to her account,
2 either an overdraft or a service fee. The investigators didn't provide me with a copy
3 of the exact fees that were in question, only to say that it was a fee on a personal
4 account which should not have been reversed.
5
6 JUDGE And if there is a fee she was contesting on an account, on her own account or a
7 relative's account, what should she have done?
8
9 JONES The correct policy is for her or the relative to contact customer service as any other
0 customer would and discuss the matter with them and have it resolved based on
1 current policies and procedures as any customer normally would.
2
3 JUDGE Did she approach a supervisor about that?
4
5 JONES Um at the time when we discussed it with the investigator she did not say that she

had. The only information that was given at that time was that she had entered her own account and made the adjustments.

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JUDGE Why was it necessary to discharge her for this instead of giving her a warning?

JONES Um basically accessing your own account and making charges is considered serious misconduct. And I suppose could have lasting, you know, impacts on the bank if people were able to make their own adjustments to their own accounts - you know, pretty much any time they wished. And so that is considered one of the serious misconducts which can result in termination on the first offense.

JUDGE Her appeal letter says this was a ten dollar monthly fee that was placed on a team member account which should not have had a fee. And so she reversed it. Is that correct, that there shouldn't be a fee on a team member account?

JONES Team member accounts are not generally assessed fees but there are certain rules and regulations and some fees can be assessed depending on what type of fee and things like that. In this case I don't have the record of which exact fee was reversed.

JUDGE Did you speak to her about this matter when it occurred?

JONES I did not. This matter was uncovered through a normal routine audit and was brought to me through our investigations department. I was involved only because I was the reporting manager of the individual being questioned.

JUDGE Did she ever bring up that she asked a supervisor for authority to do so - reverse the fee?

JONES Not to me, no.

JUDGE Any questions, Ms. Hebda, for Mr. Jones?

HEBDA Yes. Mr. Jones, now you said there was an internal investigator that questioned the claimant. Is that correct?

JONES That's correct.

HEBDA Were you present then, were you listening to the conversation?

JONES I was; I was present in the room sitting next to Ms. Nicol.

HEBDA Okay. What exactly did she say when she was told that it was found that she had reversed fees?

1
2 JONES Um the best of my recollection is I was sitting next to her when she was asked if
3 she had made, you know, made the reversal of the fees. She said yes, I did that and
4 I realize I shouldn't have. And that's kind of where the conversation ended. And
5 then the investigator, at that point, you know, just kind of thanked us and wrapped
6 up the meeting and asked us to return to our normal duties.
7
8 HEBDA Okay. So she did acknowledge she should not have done that.
9
0 JONES Yes, she did.
1
2 HEBDA How did you know she was aware of the written policy that you just read into the
3 record which is, I believe, it's Exhibit 13.
4
5 JONES Um the policies are covered during initial training when a banker is hired. It's
6 covered in depth and as we have on - I believe it's 15 bankers are required at that
7 point to agree that they have read and understand the policies and of course
8 acknowledge that through their signature and the date of that policy.
9
HEBDA Okay and you testified earlier that um often times team members are not to be
served—or, I'm sorry, not to be charged a ten dollar service fee. And if she had
been in error, if she had been in error, is it okay to fix that herself or to reverse it
herself?

JONES It's not. Even though it may have been in error if it was on the account, there is a
proper channel and it would have been taken care of and removed promptly
because it was a team member account with no question by our normal customer
service procedures. But it's not acceptable to do that on your own.

HEBDA Okay. I don't have any other questions at this time.

JUDGE The claimant also says she was discharged for hanging up on a customer. Was she
discharged for that reason?

JONES She was not.

JUDGE Any additional questions, Ms. Hebda?

HEBDA Not at this time, thank you.

JUDGE Any questions, Ms. Nicol, for Mr. Jones?

CLAIMANT Um, I don't have any questions for him, no.

2 JUDGE Ms. Nicol, we'll come to you now. What was your job with the employer?
3 CLAIMANT I was a banker.
4
5 HEBDA I'm having a hard time hearing the claimant, I'm wondering if she could speak up.
6
7 CLAIMANT I was a banker.
8
9 JUDGE What were the dates you worked there, the first day and the last day?
10
11 CLAIMANT Um June 14th of 2010 and October 31st of 2011.
12
13 JUDGE What was your rate of pay at the end of the employment?
14
15 CLAIMANT \$17.24 an hour. Oh \$15.24 an hour, I'm sorry.
16
17 JUDGE Were you discharged from the job?
18
19 CLAIMANT Yes I was.
20
21 JUDGE Were you told why you were being discharged?
22
23 CLAIMANT I was.
24
25 JUDGE What were you told?
26
27 CLAIMANT I was told that I had reversed a fee. But the – you know, which I knew I had done
28 that. But I felt very intimidated by Ron and the security person and I was in tears.
29 And I don't understand how he could say that everything was so calm and
30 everybody was nice because I was very upset. I didn't want to write the statement
31 and I didn't know I had the option to write the statement or sign it.
32
33 JUDGE So what account was this?
34
35 CLAIMANT It was on my son's account.
36
37 JUDGE How old is your son?
38
39 CLAIMANT My son is 21. 22.
40
41 JUDGE Are you a co-signer on that account?
42
43 CLAIMANT Yes, ma'am.
44

1 JUDGE So it's also your account?
2
3 CLAIMANT Um—
4
5 JUDGE If you're a co-signer.
6
7 CLAIMANT Yes.
8
9 JUDGE Okay. So it's your account and your son's.
))
) CLAIMANT It's my son's account and mine, yes.
))
) JUDGE Okay so what happened?
))
) CLAIMANT I went on—we were helping customers on the phone, sometimes in order to guide
)) them through the internet, we can't log onto their account that would be a violation
)) of privacy. So we have to log into our own.
))
))
)) I had been helping a customer on their internet account and I had pulled up mine
)) and I had seen that my son's account had been charged a ten dollar fee and
)) additionally an overdraft fee of 35 dollars. I did go to a supervisor and I asked (one
)) unintelligible word) in this situation if the fees - you know, the fees shouldn't have
)) been charged. And the response that I got was do it at your own risk. Now, risk to
)) me—I didn't know if I was risking a write-up, there was nothing said you know, I
)) mean, he certainly could have taken the call. Um—
))
))
)) JUDGE So why didn't you call him? Why did you walk over?
))
)) CLAIMANT Because our supervisors are—the way that it's set up is we sit in certain areas with
)) supervisors but my supervisor, Eric, was not there that day. And so I went and
)) asked another supervisor.
))
)) JUDGE Okay. So he said do it at your own risk. Why didn't you call a customer service line
)) if you had a question or a concern on your own account?
))
)) CLAIMANT Because I trusted my supervisor. I didn't think that he was going to lead me into a
)) direction to get me fired.
))
)) JUDGE Okay but he said don't—do it at your own risk. That means there's a potential
)) problem with you doing it. So why didn't you say okay, what's the right way to do
)) it then?
))
)) CLAIMANT Well because at that point he turned away and said, just, you know that was the
)) whole conversation.

1 JUDGE Okay, who was the supervisor?
3
4 CLAIMANT Um, it was Mike Barr.
5
6 JUDGE Mike Barr?
7
8 CLAIMANT Mmhm.
9
10 JUDGE Okay. So you approached him and you said there was a fee that you didn't agree
11 with and what did you ask him?
12
13 CLAIMANT I said there is a fee on my son's account that is a big error. And you know, I don't
14 know what to do. The fee is \$45, it's not a—you know. I didn't – I said it's \$45 and
15 he said, well go ahead and do it at your own risk. And that's all that was said. And
16 so I did that. And you know, if he had said, transfer it to me or – you know, or -
17
18 JUDGE Transfer what to him? You didn't have anything to transfer to him.
19
20 CLAIMANT Well if he had come over and looked at it I could have had him take care of it
21 himself, you know. Perhaps -maybe he just didn't want to know. I don't know
22 what he was thinking at that moment.
23
24 JUDGE What date did you do this?
25
26 CLAIMANT I don't remember the day. At the end of September. I was just coming off a two-
27 month medical leave.
28
29 JUDGE Did you know there was a policy against working on your own accounts or a family
30 member's account?
31
32 CLAIMANT I did know there was a policy but that's why I went to a supervisor for clarification
33 and for help. Had I known that I was risking my job I would never have done it. I
34 loved my job at Wells Fargo. In fact the same day that I got terminated I had got a
35 third quarter, you know, standard of excellence award with my customers, of going
36 above and beyond to help them.
37
38 JUDGE Okay, so when you spoke to the initial adjudicator you told them that the statement
39 that Mike gave you was different. You told hem "you can do it, but I hope you
40 don't get caught." So which one—what did Mike really say?
41
42 CLAIMANT It was 'do it at your own risk' because that's - . You know, when the adjudicator
43 called I was very flustered and frightened and, you know, I just felt like I had been
44 totally wrong and that there was no other way around it, but -

1
2 JUDGE When you initially filed for unemployment benefits why did you say you were fired
3 for failing a QA?
4
5 CLAIMANT Because that's how they discovered the call. Because I had heard about both of
6 them, about hanging up on a customer who was being abusive and then I had also
7 heard about this reversing the fee.
8
9 JUDGE Did you appeal this internally?
0
1 CLAIMANT With Wells Fargo?
2
3 JUDGE Yes.
4
5 CLAIMANT No. I didn't know I could. (Pause) I was never given that option. Looking back on
6 it, I would never have done it. It's -not once would I have had to go through for the
7 last month with no money and you know, I can't even get paid for the last three
8 weeks that I was on disability because the company is having some issues with my
9 doctor. So it's been really difficult.
0
1 JUDGE And why not just call or have your son call in if there was a concern on his
2 account?
3
4 CLAIMANT Because my son works as a police officer. He's working the night shift and he'd
5 was - been working like 60 hours a week. He was just inundated with stuff. And I
6 realize that I should have said, you know, you'll have to do this, I'm sorry, but had I
7 known it was risking my job I would never have done it. Not over ten dollars, that's
8 ridiculous.
9
0 JUDGE So did you reverse the ten dollars or the 45 dollars?
1
2 CLAIMANT I reversed the ten and there was an overdraft that had been charged because of the
3 ten dollar fee.
4
5 JUDGE So did you reverse the overdraft fee?
6
7 CLAIMANT I did.
8
9 JUDGE Okay, so you reversed 45, not ten dollars.
0
1 CLAIMANT Right. Right.
2
3 JUDGE Okay. Anything else, Ms. Nicol?

CLAIMANT No, no.

HEBDA On your son's account?

CLAIMANT On other accounts.

HEBDA Okay. Now why didn't you then say to this supervisor, would you do that for me since it's against policy? Would you please reverse this fee for me?

CLAIMANT I, at that moment, was not thinking of policy. You know, I just—that's why - I was confused about it, that's why I asked.

HEBDA Okay. But when you were confronted by the investigator and with Mr. Jones present, isn't it true that you admitted that you knew—you said to them, I know I shouldn't have done that. I know that that was wrong.

CLAIMANT Right. And I did say that. Because, you know, I was figuring I was going to get written up.

HEBDA So you knew you were doing something wrong when you did it.

CLAIMANT But I asked a supervisor for guidance—

HEBDA And, and—

CLAIMANT And that was the advice that I got.

HEBDA And the guidance you got was that you were taking a risk, correct? And isn't it true that you decided to take that risk?

CLAIMANT Because I was told that I could do it at my own—to do it at my own risk.

HEBDA And you chose to take the risk.

CLAIMANT That was not giving me guidance to say hey, you can't do that. That was not saying, you know, transfer it to someone else. That was not saying that he would look at it and see what he could do.

HEBDA Okay.

CLAIMANT He just—it was more of like, he didn't want to know.

HEBDA Well—and you didn't ask anybody to do it for you, did you?