

2012

Renae Nicol v. Department of Workforce Services, Workforce Appeals Board, and Wells Fargo Bank : Reply Brief

Utah Court of Appeals

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Jacson Maughan; Workforce Appeals Board; Attorney for Respondent.

Sam N. Pappas; For Utah Legal Services; Attorney for Petitioner .

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IN THE UTAH COURT OF APPEALS

RANAE NICOL,

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v.

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

Respondent.

REPLY BRIEF

ORAL ARGUMENT REQUESTED

Case No. 20120176-CA

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Attorney for Petitioner

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POINT I THE BOARD'S CONTENTION THAT THE CLAIMANT "FAILED TO MARSHAL EVIDENCE IN SUPPORT OF HIS [SIC] APPEAL" IS WITHOUT MERIT.

In its Brief, the Board argues that this court should reject the Claimant's appeal because Ms. Nicol failed to marshal evidence in support of the Board's decision, and cites

several cases which it argues support this proposition. However, the cases cited by the Board do not apply to the Claimant in the case at bar, as she is *not challenging the findings of facts* in this case. All of the cases cited by the Board regarding Claimant's duty and failure to marshal the evidence involve challenges to findings of fact.

For example, in the case of *Crockett v. Crockett*, 836 P.2d 818 (Utah Ct. App. 1992), the court refused to entertain factual challenges by Appellant due to a failure to marshal evidence. However, unlike the appellant in the *Crockett* case, the Claimant in this matter is not challenging findings of fact; it is the application of undisputed facts to the law that the Claimant is arguing. Indeed, Claimant begins her "Statement of the Facts" in the opening Brief with a statement that she does not dispute the Administrative Law Judge's findings of fact.

The Board's reliance on *Oneida/SLIC v. Onieda Cold Storage and Warehouse, Inc.*, 872 P.2d 1051 (Utah Ct. App. 1994) is similarly misplaced. The portion of the decision quoted by the Board in its' brief follows:

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While it is true that Utah Auto failed to marshal the evidence, the facts are, for the most part, undisputed. Further, Utah Auto is not challenging the evidence underlying the court's decision, but the legal conclusions drawn therefrom. Thus, Utah Auto need not marshal.

As in *Utah Auto*, the Claimant in this matter is arguing that the agency failed to properly apply the law to the particular facts of this case.

This Court should determine that as Claimant stipulated to the facts as found by the ALJ and the Workforce Appeals Board, she had no duty to marshal the evidence, and should accordingly address the merits of this appeal.

POINT II THE BOARD ERRED IN CONCLUDING THAT CLAIMANT WAS DISCHARGED FOR JUST CAUSE, AS THE ELEMENT OF CULPABILITY WAS NOT ESTABLISHED.

The Board argues that the employer established that the Claimant was discharged for just cause pursuant to R994-405-202, *Utah R. Admin. P.* In order to establish just cause for a discharge, the three elements of culpability, knowledge, and control must all be established. Claimant asserts that the Board erred in discharging her, as the element of culpability was not established. Claimant relies on the case of *Gibson v. Department of Employment Security*, 840 P.2d 780, (UT App 1992), wherein the court noted that the “regulations defining culpability require 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. *Id.* at 784.

The Respondent argues in its brief the Board “correctly balanced the factors in this case and determined that the seriousness of the offense sufficiently jeopardized the

Employer's legitimate interests such that it necessitated her immediate discharge.”

(Respondent Brief, p. 8). The brief points to no evidence in the record or the decision to support the assertion that the Board “correctly balanced the factors in this case,” and indeed there is no evidence in the record to support the assertion that the Board even considered the factors.

With regard to the Claimant's past work record, the length of her employment, and the likelihood that the conduct will be repeated, these factors are not even mentioned in the decision. The claim that the Board considered these factors, and after considering them determined that the seriousness of the offense sufficiently jeopardized the Employer's legitimate interest such that it necessitated her immediate discharge, is not supported by the decision. The decision makes no reference to these factors, or to any other balancing of factors. The decision notes that “the Employer considers compliance with the policy to be such a serious matter that it discharges employees for a single violation of the policy.” R. @ 62.

In the case at bar, there was no actual harm to the employer. Rule 994-405-202 (1), states that the conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. The Board asserts that the culpability standard does not require actual harm to the employer, only potential harm. *Fieeiki v. Dept. of Workforce Services*, 122 P.3d 706 (Utah App 2005). However, the *Fieeiki* case is distinguishable from the case at bar.

In *Fieeiki*, the Claimant was a law enforcement officer, and had a charge of

domestic violence substantiated against him. Further, the court noted in the decision the officer was not only substantiated for domestic violence, but that had been charged with a violent crime. *Id. at 709*. The conduct of the officer in the *Fieeiki* case resulted with him being charged with a crime. Accordingly, the conduct is much more serious than the Claimant's single incident of reversing the fees on the account she shared with her son. Her testimony about the fees for the account being erroneously applied is uncontested. When the Claimant found the misapplied charges, she did go to the supervisor for guidance about the fees. R. at 35. When she brought the matter to the attention of the supervisor and asked whether she could reverse the charges, she was given the curious response to "do it at her own risk." R. at 35-36. She reversed the misapplied charges, and was terminated five weeks later.

In arguing that the Claimant's conduct was so serious that discharge from her employment was necessary to avoid potential harm, the Respondent asserts that she "engaged in a dishonest, volitional act." (Respondent's Brief, p 9). There is no support for this characterization of the Claimant's conduct in reversing the fees. Had the conduct been "dishonest", would the Claimant bring the conduct to the attention of her supervisor? There is no mention in the decision of the Board, nor so much as a claim by the employer of any "dishonest" act by the Claimant. Indeed, in the Claim Report to the Department of Workforce Services regarding the discharge of the Claimant, the employer does not even answer the question regarding how the employer was harmed by the Claimant's actions. The space on the form is left blank. (*See* Exhibit 9, R. @ 009).

The factors for determining culpability pursuant to R-994-405-202(1), *Utah R. Admin. P.* were not properly applied in the Claimant's case. The decision of the ALJ and of the Board did not balance the claimant's single, isolated incident of violating a company policy, against the interests of the employer. The Board concluded that because the employer considers violation of the policy to be serious enough to justify terminating the employee, the violation sufficiently jeopardized the employer's rightful interests. R. @ 62.

The employer in this matter suffered no actual harm. In reviewing the elements of culpability, this Court considers five factors relevant to the analysis: (1) whether the employee's prior pattern of behavior was consistent with the incident of misconduct; (2) whether the employee's actions and admission of mistake indicate that the conduct will not reoccur; (3) the seriousness and flagrancy of the conduct; (4) the actual and potential harm to the employer and public; and (5) length and strength of the prior work record.

The evidence is uncontested that the Claimant had no prior incidents of misconduct at her employment. Indeed, the day she was terminated from her employment she was awarded a 3rd quarter standard of excellence award from her employer reflecting a 100% customer satisfaction survey. R. @ 7. She had an error-free work record. Claimant talked to her supervisor about the erroneous charges to the account before she reversed the charges. When asked if she had reversed the fee, she was honest and admitted that she had reversed it, and indicated that she had made a mistake.

The Utah Supreme Court has indicated in *Logan Regional Hospital v. Board of*

Review, 723 P.2d 427, 429 (Utah 1986), that the purpose of the Employment Security Act is “to provide a cushion for the shocks and rigors of unemployment. The Court has called for a liberal construction of the act: “mere inefficiency or failure of good performance as the result of inability or incapacity, inadvertence, isolated instances of ordinary negligence, or good faith errors in judgment or decisions do not constitute culpable conduct which precludes a discharged employee from receiving unemployment compensation benefits. *Id. at 429-430.*

Claimant's conduct was a violation of her employer's policy, but it was a single incident of poor judgment. She had no intent of causing harm to her employer, and the employer in fact was not harmed, and did not claim any potential or actual harm. She sought the advise of a supervisor before reversing the fees, only to be given the response to “do it at your own risk.” R. at 39.

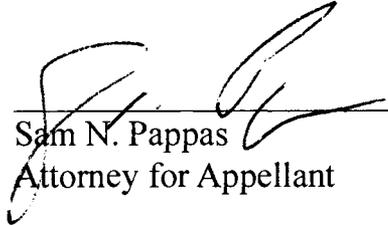
The Claimant asserts that when balanced, these factors support the conclusion that the element of culpability has not been established. The Board's application of the law to the facts of this case finding culpability, particularly when the act is to be liberally construed, is not within the realm of reasonableness and rationality, and this Court should reverse the decision of the agency.

CONCLUSION

Accordingly, this Court should consider the merits of this appeal as the facts are uncontested and therefore Claimant had no obligation to marshal the evidence. This Court should reverse the decision of the Workforce Appeals Board concluding that culpability

had been established, and award benefits to the Claimant.

Dated this 16th day of November, 2012.



Sam N. Pappas
Attorney for Appellant

Certificate of Mailing

I hereby certify that on this 16th day of November, 2012, I mailed a copy of the foregoing Reply Brief to:

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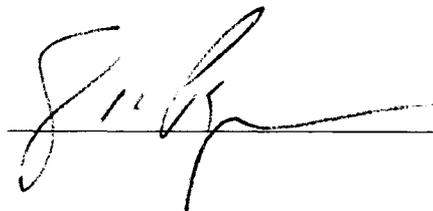


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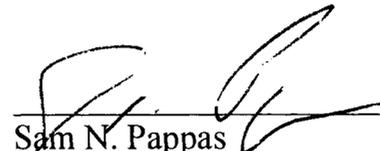
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Attorney for Appellant

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