

2012

# Ranae Nicol v. Department of Workforce Services, Workforce Appeals Board and Wells Fargo Bank : Brief of Petitioner

Utah Court of Appeals

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## Recommended Citation

Legal Brief, *Nicol v. Workforce Services*, No. 20120176 (Utah Court of Appeals, 2012).

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IN THE UTAH COURT OF APPEALS

RANAE NIC

Petitioner

v.

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

Respondent

BRIEF OF PETITIONER

Case No. 20120176

Appeal from the Final Decision of the Workforce Services Appeal  
Board denying Petitioner's claim for unemployment benefits.

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**IN THE UTAH COURT OF APPEALS**

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RANAE NICOL,

Petitioner,

v.

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

Respondents.

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**BRIEF OF PETITIONER**

Case No. 20120176

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF JURISDICTION..... 1

STATEMENT OF ISSUES PRESENTED ON APPEAL..... 1

STANDARD OF REVIEW..... 2

DETERMINATIVE LAW..... 2

STATEMENT OF THE CASE ..... 2

STATEMENT OF THE FACTS..... 3

SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 5

CONCLUSION..... 11

CERTIFICATE OF SERVICE..... 11

ADDENDA.....

    Addendum A      Decision of the ALJ

    Addendum B      Decision of the Workforce Appeals Board

    Addendum C      Exhibit 9, Employer's report to DWS

    Addendum D      Rules and Statutes

## TABLE OF AUTHORITIES

### CASES

<u>Autoliv ASP, Inc. v. Department of Workforce Services,</u> 237 P.3d 7, (UT App 2001) .....	2,11
<u>Clearfield City v. Department of Employment Security,</u> 663 P.2d 440, (Utah 1983) .....	7,10
<u>Department of Air Force v. Swider,</u> 824 P.2d 448, (UT App 1991) .....	7,8,10
<u>EAGALA, Inc. v. Department of Workforce Services,</u> 157 P.3d 334, (UT App 2007) .....	2
<u>Gibson v. Department of Employment Security,</u> 840 P.2d 780 (UT App 1992) .....	6, 7,11
<u>Grinnell v. Board of Review,</u> 732 P.2d 113 (Utah 1987) .....	7,9
<u>Logan Regional Hospital v. Board of Review,</u> 723 P.2d 427 (Utah 1986) .....	11
<u>Pro-Benefit Staffing Inc. v. Board of Review,</u> 775 P.2d 439 (UT App 1989) .....	7,10

### RULES

R994-405-202. Just Cause., <i>Ut. R. Admin. P.</i> .....	5,8,9
R994-405-201. Ineligibility., <i>Ut. R. Admin. P.</i> .....	6
R994-405-208. Examples of Reasons for Discharge, <i>Ut. R. Admin. P.</i> .....	10

**IN THE UTAH COURT OF APPEALS**

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**RANAE NICOL,**

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v.

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

Respondents.

**BRIEF OF PETITIONER**

Case No. 20120176-CA

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**STATEMENT OF JURISDICTION**

This Court has appellate jurisdiction over final orders and decrees resulting from formal adjudicative proceedings of the agency pursuant to §78A-4-103 (2)(a), *Utah Code Ann.* The Utah Court of Appeals has jurisdiction over appeals from the Utah Department of Workforce Services Appeals Board under §35A-4-508(8).

**STATEMENT OF THE ISSUES**

Whether the Workforce Services Appeals Board erred in affirming the decision of the Administrative Law Judge denying benefits to the claimant pursuant to the provisions of §35A-4-405, *Utah Code Ann.*, by finding that culpability was established by the employer sufficient to support a finding of just cause for discharge from her employment.

STANDARD OF REVIEW: When this Court reviews an agency's

application of the law to a particular set of facts, the Court gives a degree of deference to the agency. Autoliv ASP, Inc. v. Department of Workforce Services, 29 P.3d 7, (UT App 2001). Application of the Employment Security Act “requires little highly specialized or technical knowledge...uniquely within the [Board's] expertise”; therefore we grant “moderate deference” to the Board's decision. The Court will not disturb the Board's application of the law to the facts as long as it is “within the realm of reasonableness and rationality. EAGALA, Inc. v. Department of Workforce Services, 157 P.3d 334 (UT App 2007).

PRESERVATION: This argument was preserved for appeal when Petitioner appealed the decision of the Administrative Law Judge finding that the employer had established Just Cause to terminate her employment. R. @ 46; R. @ 54-56.

**DETERMINATIVE LAW**

The following statutes and rules are determinative of this appeal:

- \* Utah Code Ann. §35A-4-405, Ineligibility for Benefits. (Addendum A).
- \* R994-405-202. Just Cause., *Ut. R. Admin. P.* (Addendum A).
- \* R994-405-208. Examples of Reasons for Discharge.,  
*Ut. R. Admin. P.* (Addendum A).

**STATEMENT OF THE CASE**

Claimant filed a claim for unemployment benefits effective October 30, 2012. R @ 1-4. On November 14, 2011, Claimant was denied benefits on the grounds that the she was discharged from her employment for just cause. R. @ 17. On November 15, 2011, claimant appealed the decision denying her benefits, and a hearing was scheduled for December 6, 2011.

R. @ 18-19.

A telephonic hearing was conducted, and the Decision of the Administrative Law Judge affirmed the Department's decision denying the Claimant unemployment benefits, and relieving the employer of charges. R. @ 39-45.

On December 19, 2011, Claimant appealed the decision of the administrative law judge denying unemployment benefits, on the grounds that the ALJ failed to properly apply the law to the facts of the case in determining whether the employer had Just Cause to terminate her, and the ALJ decision is not supported by substantial evidence. R. @ 46.

On January 18, 2012, the Workforce Appeals Board affirmed the decision of the Administrative Law Judge denying unemployment benefits to the Claimant effective October 30, 2011. A Request for Reconsideration was filed on January 20, 2012, and the Workforce Appeals Board denied the request for reconsideration on February 8, 2012. R @ 65; 73.

Claimant appealed from the decision of the Workforce Services Appeals Board on March 8, 2012.

### **STATEMENT OF THE FACTS**

The Claimant, Ms. Nicol, does not dispute the Administrative Law Judge's findings of fact.

The Claimant worked for Wells Fargo Bank from June 14, 2010 through October 31, 2011, a period of 16 months. R. @ 39. She had received a copy of the Employer's policy and procedures, which prohibited employees from reversing service charges or fees on their account or that of relatives. R. @ 39. "At the end of September of 2011," the Claimant noticed that the joint account she shared with her son had a \$10 fee, and as a result of the fee, a \$35 overdraft fee on the account. The Claimant brought the improperly assessed fees to the

attention of her supervisor, and indicated that as this was a member's account there should have been no fee. R. @ 40. Had the fee not been imposed the account would not have been overdrawn, and the overdraft fee would not have been assessed. R. @ 40. The supervisor told the Claimant that she could reverse the fees “at her own risk.” R. @ 40. After speaking with her supervisor, she reversed the fee. The Claimant had other options for having the fee reversed, such as calling the customer service account line as any other customer would to request the fees be reversed. R. @ 40. On October 31, 2011, a month after she reversed the fee, she was discharged for violating policy. R. @ 40.

### **SUMMARY OF ARGUMENT**

The Administrative Law Judge and the Workforce Appeals Board failed to properly apply the law to the particular facts of this case, and erred in concluding that culpability was established and the employer had Just Cause to discharge the Claimant from her employment.

To establish culpability, the conduct must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. There was no such showing in the case at bar. The conduct resulting in discharge was an isolated incident of poor judgment, and there was no evidence that the employer was concerned that the conduct would be continued or repeated.

The Administrative Law Judge conclusion that Ms. Nicol's “failure to follow the policy was harmful to the employer's policy and ability to trust the claimant,” is not supported by the record. There was no evidence of harm to the employer resulting from this single violation of policy, nor was there a showing of potential harm. The Administrative Law Judge failed to balance the harm or potential harm to the employer against the Claimant's prior work record, length of employment and the likelihood that the behavior would be repeated, as the rule

requires. Accordingly, culpability was not established, and the finding of Just Cause is in error.

## ARGUMENT

### **THE WORKFORCE SERVICES APPEALS BOARD ERRED IN CONCLUDING THAT JUST CAUSE EXISTED FOR DISCHARGING THE CLAIMANT, AS THE ELEMENT OF CULBABILITY WAS NOT ESTABLISHED.**

The Utah Employment Security Act provides that unemployment insurance benefits must be denied if the employer had just cause for discharging the employee. In order to establish just cause for discharge pursuant to §35A-4-405(2)(a), there must be fault on the part of the employee involved. The unemployment insurance rule pertaining to establishing just cause provides:

#### **R-994-405-202. 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 might not be necessary to discharge the claimant to avoid future harm.

A Claimant is ineligible for unemployment benefits is discharged for just cause. *Utah R. Admin. P.*, R994-405-201. Before just cause will be found, the employer must establish (1) culpability, (2) knowledge, and (3) control on the part of the employee. *See id.* R994-405-202, -203.

In the case of Gibson v. Department of Employment Security, 840 P.2d 780, (UT App 1992), the Court addressed the issue of whether the claimant was terminated for just cause, and specifically addressed the circumstances surrounding the incident. 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.

In this case, neither the ALJ or the Board balanced the employees circumstances against the harm to the employer. In making the determination of culpability, The Board affirmed the Administrative Law Judge's conclusion that the employer established culpability because the employer had reasonable expectations for the Claimant to follow the Code of Conduct policy. The decision indicated that the Claimant “working and revising 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.” R. @ 42.

The ALJ's conclusions that Ms. Nicol's “failure to follow the policy was harmful to the Employer's policy and ability to trust the Claimant” is not supported by evidence in the record or testimony presented at the hearing. The record is devoid of any statement from the employer that they lost the ability to trust the Claimant. The employer's only witness at the hearing testified that “accessing your own account and making changes is considered serious

misconduct. And I suppose could have lasting, you know, impacts on the bank...it is considered one of the serious misconducts that can result in termination on the first offense". R. @ 28. In the Claim Report to the Department of Workforce Services regarding the discharge of the claimant, the employer doesn't even bother to answer the question regarding how the company was harmed by the Claimant's actions. It is simply left blank. (See Exhibit 9, R. @ 009, Addendum B).

The Utah Court of Appeals in reviewing the elements of culpability 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 the conduct will not reoccur; (the Court affirmed an award of benefits for employee who smoked marijuana on vacation, and admitted it, and voluntarily entered a treatment program, Department of Air Force v. Swider, 824 P.2d 448, 451(UT App 1991); (3) the seriousness and flagrancy of the conduct; (the Court upheld a denial of benefits where a truck driver altered a road speed governor, repeatedly violated the speed limit, disobeyed company policies for consecutive hours operating a vehicle, and had traces of marijuana in his system, Grinnell v. Board of Review, 732 P.2d 113, 114-115 (Utah 1987); (4) the actual and potential harm to the employer and the public; (the Court upheld a denial where a police officer violated sodomy laws finding egregious conduct violated the integrity of the police force, Clearfield City v. Department of Employment Security, 663 P.2d 440, 445 (Utah 1983); and (5) length and strength of the prior work record, (the Court upheld an award of benefits to an employee of seven months, who had a previous error free work record, Pro-Benefit Staffing Inc. v. Board of Review, 775 P.2d 439, 443 (UT App 1989). The court in Gibson upheld an award of benefits where employee breached a confidentiality policy, even though the employer

faced a potential law suit from the breach. Id. at 785.

The factors for determining culpability in R-994-405-202(1), *Utah R. Admin. P.* were not followed in the Claimant's case. The decision of the ALJ with respect to culpability did not balance the circumstances of the Claimant against the interests of the employer. When those factors are considered, as well as the factors traditionally considered by the court discussed above, the balance is strongly in favor of the Claimant.

First, in considering whether the employees prior pattern of behavior was consistent with this incident of misconduct, there was no analysis. Ms. Nicol worked for the employer as a bank teller for 16 months. She had no prior incidents of misconduct. In Exhibit 16, Claimant indicates, she had “no probationary periods or write ups of any kind.” She received a standard of Excellence Award for 3<sup>rd</sup> quarter reflecting a 100% customer satisfaction survey. R. @ 018. She had an error free work record. The fees she reversed were incorrectly charged to her son's account. R. @ 40. As this appears to be her only incident of misconduct, it is not part of a pattern of behavior.

The second factor, whether the employee's actions and admission of mistake indicate that the conduct will not reoccur, also weighs in favor of the Claimant. It is important to note that Ms. Nicol testified that she talked to a supervisor *before* reversing the incorrect fee, who told her to “do it at her own risk.” R @ 36. When asked by the employer if she reversed the fee, she was honest and admitted that she reversed the fee. She also acknowledged that it was a mistake. R. @ 29. This seems analogous to the Claimant in Swider where the Court affirmed an award of benefits for an employee who smoked marijuana while on vacation and voluntarily entered a drug treatment program. Id. at 454. The Claimant in the case at bar went to a supervisor before she reversed the fee; admitted to the conduct when questioned by the

employer; and indicated that she had made a mistake.

The third factor addressed by the appellate courts addressed the seriousness and flagrancy of the conduct. The claimant's conduct could hardly be considered flagrant, when she went to the supervisor before reversing the charges. Despite the ambiguous response she received from the supervisor, to "do it at her own risk," the fact that she went to a supervisor indicates that she was not acting flagrantly. While the employer's policy indicates that reversing fees is "serious misconduct," the policy does not distinguish between seriousness and harm to the bank as a result of an employee reversing fees correctly charged to a personal account, as opposed to reversing fees that are incorrectly charged to a personal account.

Contrast the seriousness of the employee's behavior in this case to the conduct of the employee in Grinnell. In that case, the truck driver whose denial of benefits was upheld by the Court, altered the road speed governor in his vehicle, repeatedly violated the speed limit, disobeyed company's policy for consecutive hours operating a vehicle, and had traces of marijuana in his system. *Id.* @ 115. Unlike these multiple and intentional violations of policy, the Claimant's violation was an isolated incident of poor judgment.

Rule 994-405-202(1), *Utah R. Admin. P.*, indicates that 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. 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. This seems to

exactly apply to the Claimant's circumstances; the conduct was an isolated incident by an employee who has established a pattern of complying with the employer's rules for sixteen months.

The fourth factor considered is the actual and potential harm to the employer and the public. Clearfield City v. Department of Employment Security, 663 P.2d 440, 445 (Utah 1983). In the case at bar, there does not appear to be any actual harm to the employer. While the decision of the ALJ indicates that “the failure to follow the policy was harmful to the Employer's policy and ability to trust the Claimant,” it does not indicate how the employer was harmed. Rule 994-405-208, *Utah R. Admin. P.*, provides examples of reasons for discharge. Subsection (1)(d) indicates that 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. In this case, there is no showing of actual harm, or that the lack of compliance in any way diminished the employers ability to maintain necessary discipline.

The fifth factor to be considered is the length and strength of the prior work record. Swider at 454. In Pro-Benefit Staffing, an award of benefits was upheld by the court to an employee of seven months who had a previous error-free work record. *Id.* @ 444. The Claimant in this case the worked for the the bank for a period of 16 months, over twice as long as the employee in Pro-Benefit Staffing, and had an error-free work record. While the violation of the policy may provide the bank a legitimate basis for terminating the employee, it does not require a denial of unemployment benefits. *Id.* at 443.

The facts of this case support the conclusion that culpability is not established because the potential harm to the employer and the seriousness of the conduct is outweighed by Ms.

Nicol's work history, length of employment and factors that support the likelihood the behavior would not be repeated. Gibson at 783-785.

Ms. Nicol's conduct was a violation of the employer's policy, but it was a single incident of poor judgment. She had no wrongful intent to harm the employer of the employer's rightful interests. The fees she reversed were incorrectly charged to her son's account. She sought out the advise of a supervisor before reversing the fees, and was told to "do it at her own risk." The claimant loved her job, and had a 16 month history of complying with the employer's rules, and had received a standard of excellence award for the 3<sup>rd</sup> quarter of 2011, reflecting a 100% customer satisfaction survey. R @ 018, Exhibit 18. She had no prior instances of misconduct on her work record and the employer had no reason to expect that this single violation, even if harmful, would be repeated. There are many reasons, given her work history, her honesty and her admission that she had made a mistake, to believe it would not.

The purpose of the Employment Security Act is "to provide a cushion for the shocks and rigors of unemployment." Logan Regional Hospital v. Board of Review, 723 P.2d 427, 429, (Utah 1986). The Utah Supreme Court has called for a liberal construction of this act: "mere inefficiency or failure of good performance as the result of inability or incapacity, inadvertences, , 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 (emphasis added).

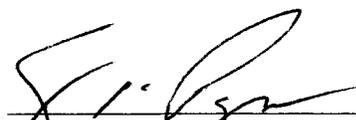
The Board's application of the law to the particular facts of this case is unreasonable. When reviewing the application of law to the particular facts of a case, the court gives a degree of deference to the agency, and will uphold the Board's decision so long as it is within the realm of reasonableness and rationality. Autoliv at 199. The decision of the Board in 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

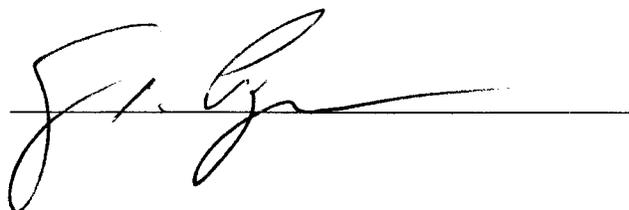
Based on the foregoing, this Court should reverse the decision of the Administrative Law Judge and the Workforce Services Appeals Board and award unemployment benefits to the Claimant.

DATED this 26<sup>th</sup> day of July, 2012.

  
\_\_\_\_\_  
SAM N. PAPPAS  
Attorney for Petitioner

### Certificate of Service

I hereby certify that on this 26<sup>th</sup> day of July, 2012, two copies and one digital copy of the foregoing Brief was mailed to Jaceson R. Maughan, Attorney for Respondent, P.O. Box 45244, Salt Lake City, Utah 84145-0244.

  
\_\_\_\_\_

## ADDENDA

## ADDENDUM A

**DEPARTMENT 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.

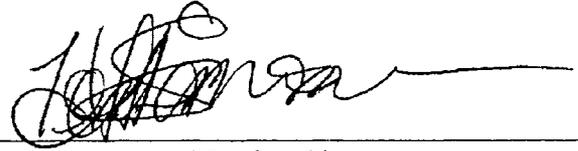
### **DECISION AND ORDER:**

#### **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.



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Heather Simonson  
Administrative Law Judge  
DEPARTMENT OF WORKFORCE SERVICES

Issued: **December 7, 2011**

HS/tc

## ADDENDUM B

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.

**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

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.

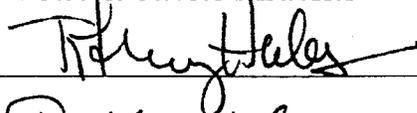
The Employer, Wells Fargo Bank, is eligible for relief of benefit charges in connection with this claim, as provided by §35A-4-307(1) of the Act.

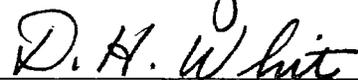
**APPEAL RIGHTS:**

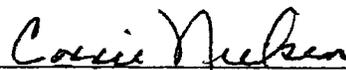
Pursuant to §63G-4-302(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request 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

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

*Corrie Almas*

## ADDENDUM C

UNEMPLOYMENT INSURANCE  
OFFICIAL NOTICE OF CLAIM FILED



WELLS FARGO BANK 003044-1 RANAE NICOL 528-13-4832

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

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

VOLUNTARY QUIT (Separation was initiated by the employee.)

A. What reason did the employee give for quitting? \_\_\_\_\_

B. Was the employee told he/she would be discharged if he/she did not quit? Yes  No   
(If yes, please answer the questions for DISCHARGE below.)

C. Did the employee give advance notice for quitting? Yes  No

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

Was the employee paid through the date of notice? Yes  No

DISCHARGE (Separation was initiated by the employer.)

A. What is the reason this employee was discharged? art violated  
code of ethics policy - see attached

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

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

Please return the completed form to the address on page one by 11/11/11

[Signature] Debbie Durand CSR 907.707.057 11-8-11  
Signature Printed Name Title Phone Ext. Date

DO NOT WRITE BELOW THIS LINE



## ADDENDUM D

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

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

### (1) Culpability.

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**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.