

2002

Market Reps Com, Inc v. Workforce Appeals Board Dept of Workforce Services : Brief of Appellant

Utah Court of Appeals

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Workforce Appeals Board Dept of Workforce Services; Appellees.

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IN THE UTAH COURT OF APPEALS		
MARKET REPS COM, INC,)	
)	
Plaintiffs/Appellant,)	BRIEF OF APPELLANT
)	MARKET REPS.COM
vs.)	
)	
WORKFORCE APPEALS BOARD)	APPELLANT COURT CASE NO.
DEPT OF WORKFORCE SERVICES,)	20020622-CA
)	
Defendants/Appellees.)	
)	
Appeal From Decision Of Workforce Appeals Board		

WORKFORCE APPEALS BOARD
DEPT OF WORKFORCE SERVICES
PO Box 45255
Salt Lake City, UT 84145
Defendant/Appellees

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES.....	1
STANDARD OF REVIEW.....	1
DETERMINATIVE STATUTES.....	2
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS.....	5
SUMMARY OF THE ARGUMENT.....	7
ARGUMENT.....	9
<u>I. EMPLOYER’S ACTIONS CLEARLY SATISFY THE FIRST TWO REQUIREMENTS THAT EMPLOYEE WAS DISCHARGED FOR “JUST CAUSE”: CULPABILITY AND KNOWLEDGE.</u>	9
<u>A. Culpability. The Employee’s inability to consistently reach the Company’s sales quota was so serious that continuing the employment relationship would jeopardize the employer’s rightful interest.</u>	9
<u>B. Knowledge. The Employee had more than sufficient knowledge to complete her duties and responsibilities, and Employer had informed her regarding her inability to meet sales quotas necessary enough for her to change her actions or be terminated.</u>	11
<u>II. EMPLOYEE DIRECTLY CONTROLLED HER SALES QUOTAS AND WHEN SHE DID NOT MEET SAID QUOTAS, EMPLOYER HAD JUST CAUSE TO TERMINATE EMPLOYEE.</u>	12

A. Workforce Services erroneously interpreted and applied Utah statutes that provide for employers to terminate salesperson for “just cause” when the employees do not reach well established and communicated sales goals......12

B. Workforce services acted arbitrary and capriciously in not following statutory guidance allowing for employers to terminate employees for not meeting “performance standards.”.....14

C. Public policy dictates that Employers should have the power to protect their “rightful interest” and terminate salespersons that do not reach sales goals......15

CONCLUSION.....16

TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>Pages</u>
<u>Autoliv Asp, Inc. v. Department of Workforce Services,</u> 2001 UT App 198 ¶ 15, 29 P. 3d 7.....	1,11
<u>Clearfield City v. Department of Employment Security,</u> 663 P.2d 440, 442-43 (Utah Ct.App.1983).....	9
<u>Johnson v. Department of Employment Security,</u> 782 P.2d 965, 969 (Utah Ct.App.1989).....	9
<u>Law Offices of D.P. White v. Board of Review,</u> 778 P.2d 21, 24 (Utah Ct.App.1989).....	11
<u>Nelson v. Department of Employment Security,</u> 801 P.2d 158 (Utah Ct.App.1990).....	9,10,11
<u>Professional Staff Mgmt., Inc. v Department of Employment Sec.,</u> 953 P. 2d 76, 79 (Utah Ct.App.1998).....	1
<u>SOS Staffing Services, Inc. v. Workforce Appeals Board,</u> 1999 UT App 210 at ¶ 8, 983 P.2d 581.....	2

TABLE OF AUTHORITIES (continued)

<u>Statutes/Rules Cited</u>	<u>Pages</u>
Utah Code Annotated § 78-2a-3 (1953, as amended).....	1
Utah Code Annotated § 63-46b-16(4)(d) & (4)(h)(iv) (2001).....	2
Utah Administrative Code R994-405-201 (2002).....	2,5,9
Utah Administrative Code R994-405-202 (2002).....	2,3
Utah Administrative Code R994-405-202(1) (2002).....	9
Utah Administrative Code R994-405-202(2) (2002).....	11
Utah Administrative Code R994-405-202(3)(a) (2002).....	13
Utah Administrative Code R994-405-202(3)(b) (2002).....	14

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction to hear this matter pursuant to Utah Code Annotated § 78-2a-3 (1953, as amended). This is an appeal of right of a final order of the Workforce Appeals Board, of the Department of Workforce Services.

STATEMENT OF ISSUES

May an employer rightfully terminate a salesperson for not meeting well established sales quotas, when that employer adequately demonstrates that reaching the quota was within the salesperson's "control" and thereby show "just cause" for the termination?

STANDARD OF REVIEW

The Appellant in this matter does not contest the underlying factual findings, rather the Appellant challenges the Workforce Appeals Board's application of the Employment Security Act to those facts.

When this Court reviews an agency's application of the law to a particular set of facts it gives "a degree of deference to the agency." Autoliv Asp, Inc. v. Department of Workforce Services, 2001 UT App 198 ¶ 15, 29 P. 3d 7 (citing Professional Staff Mgmt., Inc. v Department of Employment Sec., 953 P. 2d 76, 79 (Utah Ct.App.1998)).

The degree of deference the Court must accord an agency's application of law to fact "is ordinarily determined by a 'sliding scale,' which hinges on policy concerns, the

agency's expertise, and whether the issue is fact-driven or susceptible to uniform legal rules." Autoliv, 29 P. 3d at 10 (quoting SOS Staffing Services, Inc. v. Workforce Appeals Board, 1999 UT App 210 at ¶ 8, 983 P.2d 581).

This Court should review the decision of the Workforce Appeals Board Order granting unemployment benefits to the claimant and charging Appellant for these costs, to determine if the Agency has erroneously interpreted or applied the law and/or if the Agency's action is arbitrary or capricious. Utah Code Ann. § 63-46b-16(4)(d) & (4)(h)(iv) (2001).

DETERMINATIVE STATUTES

Utah Administrative Code R994-405-201 (2002). A separation is a discharge if the employer was the moving party in determining the date the employment ended. Benefits shall be denied if the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which was deliberate, willful, or wanton and adverse to the employer's rightful interest. However, not every legitimate cause for discharge justifies a denial of benefits. A just cause discharge must include some fault on the part of the worker. A reduction of force is considered a discharge without just cause at the convenience of the employer.

Utah Administrative Code R994-405-202 (2002). 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 that 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. A long term employee with an established pattern of complying with the employer's

rules may not demonstrate by a single violation, even though harmful, that the infraction would be repeated. 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 worker 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 that the worker 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 worker had knowledge of the expected conduct. After a warning the worker 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 that 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. Utah Administrative Code R994-405-202 (2002)

STATEMENT OF THE CASE

This case is a matter of first impression. To the best of Appellant's knowledge, there are no prior Utah cases that give guidance to Workforce Services and Employers on how to interpret the "control" issue regarding an employee's discharge due to the inability of employees to reach sales quotas constituting unsatisfactory work performance.

This matter began when the employee, Lori Lancaster (hereinafter "Employee" and/or "Claimant"), did not meet her sales quota at various times over a three month period while working for her employer, Market Reps.Com, Inc. (hereinafter "Employer" and/or "Company"), a telemarketing company. After giving her verbal, written and other warnings, employee was terminated. About a week after Employee's termination, Employee submitted a claim for unemployment benefits to Utah Workforce Services. Workforce Services granted benefits to the Employee and charged Employer for those benefits.

Employer appealed to the Department of Workforce Services on April 19th, 2002 and Administrative Law Judge, Valerie Argyle, upheld the Workforce Services decision and benefits were allowed and charged to Employer.

Employer then appealed to the Workforce Appeals Board on May 17th, 2002, and the Workforce Appeals Board upheld the decision of the Administrative Judge.

The Workforce Appeals Board erred in allowing unemployment benefits. The Employer showed *just cause* for discharging the employee in accordance with Utah Administrative Code R994-405-201 (2002).

STATEMENT OF FACTS

1. Appellant is a telemarketing company with its place of business located at 1552 West 200 North Suite B., Cedar City, Utah 84720 (hereinafter “Employer” and/or “Company”).

2. On or about August 10, 2001 Employee was hired to work for Employer at its place of business and was a fully capable and valued employee for the majority of time employed.

3. Employer’s company policy requires employees to meet certain sales percentage levels per hour or Employer loses revenue through lost sales and lost leads that were already purchased by Employer.

4. This Sales Percentage Quota required by Employer of all employees was .65 sales percentage level (a .65 sales goal requires that each employee average at least .65 sales per hour over a weeks time). This quota was established as a threshold where the Employer either makes or loses money.

5. All of Employer’s revenue and costs are based on a per hour basis. The Sales Percentage Quota is a company wide policy and all employees are informed of such when

they are hired and throughout their employment. This quota is critical to Employer's success as a company.

6. Employee's required Sales Percentage Quota did not change during her entire employment and Employee was successful in exceeding her quota more than 95% of the time while with the Company. More particularly, based on an Employee Review on or about September 13, 2001, Employer stated that Employee "has the capability to be one of our top sellers," and met all of the standards for a raise and was indeed given an increase in pay at that date.

7. The process for maintaining the Sales Percentage Quota company wide and among the employees is as follows:

- a. when an employee falls below .65 for a week's time, the employee is given a verbal warning;
- b. the second occurrence below .65 results in a written warning to the employee;
- c. the third time an employee falls below .65 for a given weeks time, the employee is suspended and given an adherence contract, in which the employee signs an agreement in recognition that if the employee does not improve in the upcoming week, the employee will be terminated.

8. In this matter, from the Employee's hire date, thru 2001, Employee failed to meet Employer's Sales Percentage Quota two times and was given a verbal, then written warning.

9. During January 2002, Employee's attitude toward her job began to change dramatically and Employee's weekly sales percentage ratios were beginning to decline on a regular basis.

10. On or about January 28, 2002 thru February 7, 2002, Employee failed to meet the weekly sales percentage average requirements set by Employer and clearly communicated to the Employee. During this period she was given a written warning and was instructed to meet the sales percentage goal for the next week or be terminated.

11. Employee again failed to meet the sales percentage goal and was terminated on February 7, 2002.

12. On or about February 11, 2002, Employee made a claim for unemployment benefits to Utah Workforce Services.

SUMMARY OF THE ARGUMENT

Appellant, like all employers, has the right to terminate an employee for "just cause" and not be charged for unemployment benefits. Salespersons for an employer should not be treated any differently than other employees when determining if their actions constitute "just cause" for dismissal. Employers should be responsible to

establish reasonable sales goals that are met by the majority of the employees, communicate those sales goals adequately, train the salespersons to succeed, and then if an employee cannot consistently reach the sales goals as other employees are, the employer should have the right to terminate that employee and not be charged for unemployment benefits.

Control is not an issue. Salespersons certainly have “control” over whether or not they will reach certain minimum sales quotas. This is evidenced by the fact that most other salespersons in the company are consistently meeting the minimum standards under the same conditions, training and supervision.

Attitude is an issue. Attitude is a considerable factor in determining whether or not an employee will succeed as a salesperson. In fact, this is the heart of the “control” element in determining just cause in the termination of an employee. The employee has the complete control of their attitude and whether or not they will succeed. Thus an employer should certainly have “just cause” for an employee that cannot meet certain sales goals due to the attitude of the employee.

In this matter, Employer had maintained the same sales script, training procedures, products, and Sales Percentage Quotas during the entire time Employee was employed. Employee was given all of the necessary information and instruction to control her own success, and after a length of employment ultimately, employee failed to be consistent in

her performance. The Employer showed *just cause* for discharging the employee in accordance with the Utah Administrative Code R994-405-201 (2002).

ARGUMENT

I. EMPLOYER’S ACTIONS CLEARLY SATISFY THE FIRST TWO REQUIREMENTS THAT EMPLOYEE WAS DISCHARGED FOR “JUST CAUSE”: CULPABILITY AND KNOWLEDGE.

A. Culpability. The Employee’s inability to consistently reach the Company’s sales quota was so serious that continuing the employment relationship would jeopardize the employer’s rightful interest.

Pursuant to Utah Administrative Code R994-405-202 (1) (2002) an employer must meet the culpability standard for providing just cause and show that “the conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest.” See Johnson v. Department of Employment Security, 782 P.2d 965, 969 (Utah Ct.App.1989)(citing Clearfield City v. Department of Employment Security, 663 P.2d 440, 442-43 (Utah Ct.App.1983).

In Nelson v. Department of Employment Security, 801 P.2d 158 (Utah Ct.App.1990), it was determined that the Employer satisfied the “culpability” standard when firing an employee for not properly following company policies regarding the redemption of discount coupons. The employer in Nelson had a legitimate “rightful interest” in protecting any losses that may occur if employees improperly handled store coupons at the register. More particularly the Court held that “as an employer, Dan’s

Foods has a financial interest in and legitimate need to control the use and redemption of discount coupons.” Nelson at 162.

In the matter at hand, Appellant’s rightful interest far exceeds that of a grocer setting policies for discount coupons. In a grocery store, the ultimate profit is earned through sales of consumer goods, not through controlling the redemption of discount coupons. Appellant’s interest is much more serious, in that as a telemarketer, salespersons on the phone directly control the profit and outcome of the Company on a year to year, day to day and hourly basis. It is critical for the Employer to protect its rightful interest by establishing sales quotas and enforcing said quotas with terminations if necessary.

A small variance in the salespersons production percentage per hour can have a dramatic impact on the profit or loss of the Company. In this case, the Employer had established a .65 sales percentage level for all employees (a .65 sales goal requires that each Employee average at least .65 sales per hour over a weeks time). This quota was established as a threshold where the Employer either makes or loses money. As arbitrary as .65 may sound, in a company driven by strict sales performance goals, a “Sales per Hour” threshold is absolutely necessary in order to protect the Employer’s rightful interest. It’s a sad reality, but there has to be some “cut-off” established and adhered to. If the line is not .65, then is it .60 or .55? At some point, after ample warnings and

training, the Company has to be allowed to terminate its employees for not maintaining a certain sales quota.

Regrettably, in cases such as this, its hard to terminate an employee that is so close to meeting the sales quota. However, a line must be drawn and adhered to. The Employer must protect its rightful interest through strict sales goals and thus maintain its profitability and its ability to stay in business and provide jobs for other employees.

B. Knowledge. The Employee had more than sufficient knowledge to complete her duties and responsibilities, and Employer had informed her regarding her inability to meet sales quotas necessary enough for her to change her actions or be terminated.

Pursuant to Utah Administrative Code R994-405-202 (2) (2002) an Employer must satisfy the knowledge element for showing just cause in the termination of an employee and demonstrate that “the worker must have had knowledge of the conduct the employer expected.”

This Court has established that there are two ways to establish that an employee had knowledge: “(1) the employer must have provided a clear explanation of the expected behavior or a written policy regarding the same; or (2) the conduct involved is a ‘flagrant violation of a universal standard of behavior’.” Autoliv Asp, Inc. v. Department of Workforce Services, 29 P. 3d 7, 11 (Utah Ct.App.2001)(citing Nelson at 162)(quoting Law Offices of D.P. White v. Board of Review, 778 P.2d 21, 24 (Utah Ct.App.1989).

In this case, Employee did not act in a ‘flagrant’ manner. However, it is clear that Employer went to great lengths with this Employee, and with all employees, to make sure that all were aware of the sales percentage quotas and they knew exactly how to succeed in their particular job function. It is in the Employer’s best interest to hire and train good employees, rather than have inordinate high turn over rates. Employee was made aware of these sales quotas and the consequences of not meeting them during initial and continuous employee trainings, through verbal and written warnings and through an adherence contract meeting with Employee’s supervisor.

Employee knew that if these sales quotas were not met then she would be terminated. Moreover, Employee demonstrated her ability to “bounce” back from poor sales weeks in the past and was keenly aware of her job responsibilities and how to succeed. Appellant contends that Employee simply was “burned out” near the end of her employment and her attitude was directly related to her sales performance. Employee knew the requirements but could not mentally motivate herself to perform.

II. EMPLOYEE DIRECTLY CONTROLLED HER SALES QUOTAS AND WHEN SHE DID NOT MEET SAID QUOTAS, EMPLOYER HAD JUST CAUSE TO TERMINATE EMPLOYEE.

A. Workforce Services erroneously interpreted and applied Utah statutes that provide for employers to terminate salesperson for “just cause” when the employees do not reach well established and communicated sales goals.

There is a dearth of cases in Utah Courts addressing the “control” issue in relationship to the control a salesperson has over their production, quotas and/or sales averages. However, there is sufficient guidance under statute that was erroneously interpreted and applied by the Workforce Appeals Board.

Utah Administrative Code requires that the conduct causing the discharge must have been within the employee's control, 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.”
UAC R994-405-202(3)(a) (2002) (emphasis added).

Appellant strongly urges this Court to consider the impact of “continued inefficiency” in the ranks of a company that is strictly driven on the performance of its sales representatives. It is critical for the success of the company to instruct, train, supervise and re-train its sales staff to be successful. The Appellant in this case took such steps to ensure Employee had the “tools” and training to “control” her sales percentage levels.

In fact, Employee had out performed other employees on a regular basis and was highly successful in prior months in relationship to her sales percentages and had clearly shown she “had the ability to perform satisfactorily.” Employee simply had become

“inefficient”, showed a “lack of care” and had given up on her ability to reach well established and communicated sales goals.

The Workforce Appeals Board erroneously interpreted and applied the law in not determining that the Employee’s inefficiency and lack of care, in light of her previous ability to perform satisfactorily, constituted “just cause” for the Employee’s dismissal.

B. Workforce services acted arbitrary and capriciously in not following statutory guidance allowing for employers to terminate employees for not meeting “performance standards.”

Utah Administrative Code sets forth that “the Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards” and met the just cause standard. UAC R994-405-202 (3)(b) (2002). However, the Department recognizes, as does Appellant, that “while such a circumstance may provide a basis for discharge, this does not mean benefits will be denied.” *Id.*

Appellant is not arguing that the Employee should be denied benefits, but that Appellant should not have been “charged” for Employee receiving said benefits. Moreover, it should be determined that Appellant met the “just cause” standard.

In this case, Appellant had provided clear, concise and well established performance standards. Although these performance standards were directly related to sales percentages, which Workforce Service argues are outside the control of the

employees, these performance standards were being met by over eighty percent (80%) of the employees at any given time.

Efficiency becomes even more critical in light of the fact that the performance standards were directly related to the sales of the company. Workforce Services should have recognized this fact, but chose to arbitrarily side on that of the Employee, which Employee new the performance standards and chose not to meet them because of her attitude and own inefficiency.

C. Public policy dictates that Employers should have the power to protect their “rightful interest” to terminate salespersons that do not reach sales goals.

Employers must be given the ability to terminate salespersons that do not meet reasonable, well established and clearly communicated sales goals. This is even a more legitimate policy if the majority of other salespersons are reaching the sales goals and a minority or not. The Employer should have the right to terminate the regular, but few, employees that cannot meet reasonable sales expectations.

It is a hardship on employers to be charged for unemployment benefits when they are simply trying to create a system of efficiency and effectiveness within the company and are forced to terminate the few that do not meet performance standards. The public needs companies to be efficient, to better succeed and provide more jobs and revenue to the economy.

If employers are required to lower sales quotas to serve the masses, how far must they go? Where is the line to be drawn? At some point, Employers need the ability to set a reasonable level of expectation and enforce that level. If the Employer provides training, supervision, communicates the expectations properly and then is forced to terminate an employee for not reaching said goals, then the Employer should not be punished for taking necessary action to protect their rightful interest.

In this case, the Employee was given all of the necessary information and instruction to control her own success, and after a length of employment ultimately failed to be consistent in her performance.

CONCLUSION

As set forth above, the Workforce Services Appeals Board committed reversible error in erroneously interpreting or applying the law, and acted arbitrary or capricious in not following statutory guidance. Appellant respectfully requests the Court to determine that Appellant had “just cause” to terminate claimant/employee and order Workforce Services to not charge Appellant for the unemployment benefits granted to the claimant/employee.

//

DATED this 19th day of November, 2002

MARCHANT, KOHLER & KYLER, LLP

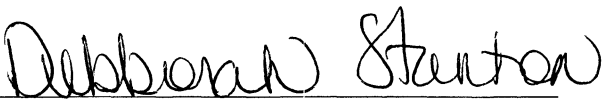


Mark J. Kohler
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CERTIFICATE OF SERVICE

I certify that I mailed a true and correct copy of the foregoing BRIEF OF APPELLANT OF MARKET-REPS.COM, INC., this 19 day of November, 2002, to the following:

Department of Workforce Services
P.O. Box 45244
Salt Lake City, Utah 84145



Deborah Stanton

ADDENDUM

NO ADDENDUM IS REQUIRED OR
NECESSARY TO BE ATTACHED

DATED this 19th day of November, 2002

MARCHANT, KOHLER & KYLER, LLP



Mark J. Kohler

Attorney for Market-Reps.com, Inc.