

2003

Showalter Motor Company, Inc. v. Workforce Appeals Board and Merlan M. Murphy: Reply Brief

Utah Court of Appeals

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ARGUMENT

I THE CLAIMANT DID HAVE KNOWLEDGE OF AND CONTROL OVER HIS CONDUCT WHICH LED TO HIS LOSS OF EMPLOYMENT AS SHOWN IN THE RECORD.

In the second paragraph of the Statement of Facts section of Respondent's Brief, it is alleged that the Claimant had no indication from the Employer that the Employer was unhappy with Claimant's job performance. This is contrary to the record. The record clearly indicates that the Employer was unhappy about the Rick Arnold ticket in regards to the missing \$3,700.00, and communicated that concern to the Claimant prior to termination. (T. at 34:17-26). The Employer also demanded a copy of the related work ticket and payment information prior to termination and as early as October 2002, which the Claimant never provided. (T. at 30:39-43 and 31:1-10). It is clearly gleaned from these portions of the record that the Employer was concerned about embezzlements by the Claimant, that the Employer's investigation of this had begun prior to termination, that prior to termination the Employer demanded information from the Claimant which the Claimant should have had if the Claimant was properly performing his duties of employment, that prior to termination the Claimant was not cooperating with the Employer in these requests for information, and that prior to termination the Claimant had notice of his conduct and notice of the Employer's concerns. Certainly, the Claimant would have motive to not cooperate if he was guilty of embezzlement and certainly the Claimant had control in his decision of whether or not cooperate in the investigation.

Regarding investigations, Utah Admin. R.994-405-206(1)[last sentence] states, "If an

employer discharged an individual because of preliminary evidence, but did not obtain “proof” of the conduct until after the separation notice was given, it may still be concluded the discharge was caused by the conduct the employer was investigating.” This is indeed what the Department of Workforce Services correctly concluded, based on evidentiary support, in the WFS Decision (T. at 11) as a reason for discharge, that, although the Employer did not have proof of the embezzlements, there was a basis for investigating and thus a basis for discharge. Incidentally, although the Claimant is deemed innocent until proven guilty, a criminal information has now been filed in the Eighth District Court regarding this very issue as Case No. 041800177, filed on April 29, 2004, which supports the fact that the references in the record to a pre-termination investigation (i.e. T. at 11, 30, 31 and 34) are real. A certified copy of the information is attached hereto in the Addendum. Count I, a third degree felony is in reference to the Rick Arnold matter, other of the Counts also relate to incidents occurring at the Employer’s place of business while the Claimant was employed there which were also mentioned in the record (T. at 10, 31 and 32).

Although the drug test was the “final incident” which led to the termination of the Claimant’s employment (see T. at 10, 39 and 51), the preponderance of evidence established clearly in the record supports a finding that the investigation of the embezzlements which initiated prior to the termination provided just cause under the governing statutes and regulations for termination.

CONCLUSION

The investigation concerning the embezzlements was initiated prior to termination as shown by the record which provided just cause to the Employer for termination and in fact

was a reason for the termination. Thus, the knowledge, control and culpability elements have been met. Thus, the decision of the ALJ and of the Workforce Appeals Board was erroneous and/or outside the realm of reasonableness and rationality. Wherefore, the Petitioner respectfully requests that this matter be reversed and remanded to the Workforce Appeals Board.

Respectfully submitted this 18th day of May, 2004.



DANIEL S. SAM
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Heather Eskelson, do hereby certify that on May 18, 2004, I mailed first class, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER

to:

MICHAEL R. MEDLEY
Attorney for Respondent
Workforce Appeals Board
Department of Workforce Services
140 East 300 South
P.O. Box 45244
Salt Lake City, Utah 84145-0244

Merlan M. Murphy
Respondent
P.O. Box 1386
Vernal, Utah 84078



Heather Eskelson, Legal Secretary

ADDENDUM

STATE OF UTAH }
County of Uintah } ss.

I, JoAnne McKee, Clerk of the District Court, do hereby certify that the above and foregoing is a full, true and correct copy of the original document.

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH

APR 29 2004

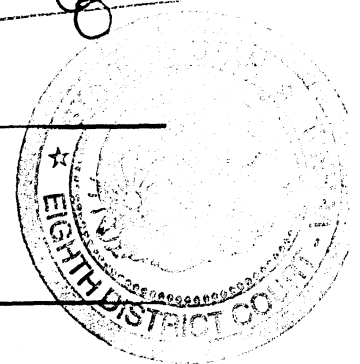
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is on file in my office.
In witness whereof I hereunto set my hand and seal
of that said Court above mentioned, this 18th
day of May A.D. 2004

BY JOANNE MCKEE, CLERK
DEPUTY

JOANNE MCKEE

By Smagorin Deputy



IN THE EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR UINTAH COUNTY, STATE OF UTAH

THE STATE OF UTAH,
Plaintiff,
vs.

MERLAN M. MURPHY,
DOB: 09/20/1971,
Defendant.

INFORMATION

Case No. 041800177FS
Judge Payne

The undersigned JoAnn B. Stringham, states on information and belief that the defendant, in Uintah County, State of Utah, committed the crimes of:

Count 1: THEFT (324), in violation of Utah Code Ann. §76-6-404, a third degree felony, as follows: That on April 17, 2001, in Uintah County, the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and (i) the value of the property or services was or exceeded \$1,000 but was less than \$5,000.

Count 2: THEFT (327), in violation of Utah Code Ann. §76-6-404, a class B misdemeanor, as follows: That on or between 5/1/2002 and 9/30/2002, in Uintah County, the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was less than \$300. (Jennifer King)

Count 3: THEFT (327), in violation of Utah Code Ann. §76-6-404, a class B misdemeanor, as follows: That on July 8, 2002, in Uintah County, the defendant obtained or exercised unauthorized

control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was less than \$300. (Patricia McManus)

Count 4: **THEFT** (327), in violation of Utah Code Ann. §76-6-404, a class B misdemeanor, as follows: That on March 28, 2003, in Uintah County, the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was less than \$300. (Earl Sanford)


Count 5: **THEFT** (327), in violation of Utah Code Ann. §76-6-404, a class B misdemeanor, as follows: That on January 17, 2003, in Uintah County, the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was less than \$300. (Lee Bowman)

Count 6: **THEFT** (326), in violation of Utah Code Ann. §76-6-404, a class A misdemeanor, as follows: That on January 16, 2003, in Uintah County, the defendant obtained or exercised unauthorized control over the property of another with the purpose to deprive the owner thereof, and that the value of said property was or exceeded \$300, but was less than \$1,000. (Troy Nielson)

This information is based on evidence obtained from the following witness: Wayne Hollebeke

Authorized for presentment and filing:

4-27-04
Date


Ann B. Stringham
Uintah County Attorney