

2004

Harley Davidson of Northern Utah v. Workforce Appeals Board, Department of Workforce Services, and Brandi L. Mason: Reply Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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HARLEY DAVIDSON OF
NORTHERN UTAH,

Petitioner,

vs.

WORKFORCE APPEALS BOARD,
DEPARTMENT OF WORKFORCE
SERVICES, and BRANDI L. MASON,

Respondents.

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No. 20040106-CA

PRIORITY NO.: 14

PETITIONER'S REPLY BRIEF ON APPEAL

Appeal from the Decision of the Utah Workforce Appeals Board

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UTAH APPELLATE COURTS

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APPELLANT'S BRIEF

Petitioner, Harley Davidson of Northern Utah submits this reply brief in support of appeal before this Court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Petitioner

Harley Davidson of Northern Utah, a Utah Corporation

The Respondents

Department of Workforce Services,

Brandi L. Mason

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ARGUMENT

I. The Findings of Fact Are Not in Question.

Respondent incorrectly argues that Petitioner has failed to marshal the evidence to appropriately challenge the findings of fact issued by the ALJ and the Board, when that does not apply here. The controlling findings of fact are not in dispute. Those that are in dispute have no relevance on this appeal. Petitioner does not challenge the ALJ's findings of fact, rather it challenges their application of the undisputed facts to the law. That challenge does not require such marshaling of the facts as has been argued by Respondent. It is rather, the application of the facts the ALJ used in justifying a denial of just cause to terminate an employee which is an argument of law.

This employee was someone who deliberately broke a promise to the owner of the company, and then went behind that owner's back to obtain "permission," not to break the promise, but to rectify a situation she caused which breached the very obligation she had promised to keep. It is not disputed that Ms. Mason had an extensive problem clocking in and out. She was the single worst offender in the entire company. It is not disputed that she had been reprimanded for that problem because of her repeated offenses of the employer's policy. It is not disputed that in an attempt to correct the problem, a promise had been exacted of her by the owner of the company to not to forget to clock in and out. It is further not disputed that she broke that promise. Those are the facts established in the record. While there are other facts that support a reversal of the ALJ's decision, they are not relevant to this

appeal. Those facts which are relevant are sufficient to establish just cause for termination. And just cause for termination should have been found by the ALJ. It was a legal error for the ALJ to fail to make that finding.

Respondent has introduced argument in reliance upon peripheral issues that while they may tend to support its desired conclusion, are not applicable to the actual appeal before the Court. No matter how you spin it, Ms. Mason had been warned to correct her behavior. She was the single worst offending employee. It was so bad that the owner/employer required a promise that she comply with the employer's rules. She made that promise. Then she broke it. She failed to correct her behavior even after warnings, and a final chance with an accompanying promise. That is just cause enough for termination.

Additionally, there is the issue that she went behind her employer's back to obtain "permission" to violate the promise to correct her failure. Without disclosure of the promise, that "permission" was obtained through knowing, deceitful artistry. That also provides the employer with sufficient just cause for her termination. The decision of the ALJ misapplied the law and it should be reversed.

Petitioner readily recognizes that Ms. Mason claims she obtained permission from her supervisor to clock in on a day she was not at work. But she never obtained permission to break her promise to Mr. Timmons, who was her ultimate employer. She never disclosed to her supervisor that such a promise even existed before she obtained the alleged "permission" to clock in on a day she was not at work. That is just cause for termination. The facts

relevant to the appeal are not in dispute, only their application to the law. Ms. Mason had knowledge of the promise, that is not disputed. Ms. Mason certainly recognized that she broke the promise, demonstrating her own culpability. Ms. Mason further had control over whether or not she could break that promise. Harley Davidson had just cause to terminate her employment. The decision of the ALJ and the Board should be reversed.

II. Respondent Was Terminated for Just Cause.

The Unemployment Insurance Rules pertaining to Section 35A-4-405(2)(a) of the Act provide, in part that

“[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 is 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.”

Utah Admin. Code R994-405-201 (2003) (emphasis added).

An employee is terminated for just cause if three factors are met: “(1) culpability, (2) knowledge of expected conduct, and (3) control over the offending conduct.” *Nelson v. Department of Employment Sec.*, 801 P.2d 158, 161 (Utah App. 1990); accord *Grinnell v. Board of Review*, 732 P.2d 113, 114 (Utah 1987) (per curiam); see also Utah Admin. Code 994-405-202 (2005). All three elements are satisfied for both causes of termination. Each of these three factors were met on several levels. They were met as she continued to fail to clock in and out properly, they were met as she directly disobeyed her employer, and they

were met when she went behind her employer's back to obtain "permission" to correct her failure.

Ms. Mason (the "Respondent" or the "employee") was repeatedly told that she must clock in when she arrived to work and clock out when she left. The employee was repeatedly told this because she failed to clock in or clock out on numerous occasions. She was the single worst offender. In fact, after having been reprimanded on the issue, she directly promised her employer/owner that she would correct this behavior, but did not. Her failings, if adopted by the general body of workers for the employer, would lead to chaos in the company. This is not a trivial matter for the employer. The fact that a final chance to comply was extended to Ms. Mason, along with getting her promise to comply, does not mean that she was a good employee being treated unfairly. She could have been discharged when the final warning was given. Instead, she promised to follow the company policy and to no longer engage in filing false check-in/check-out records.

Respondent appears to argue that there could not be any fault in failing to clock in and out. Respondent argues that simple forgetfulness could not amount to fault. The fact is, she had forgotten to properly clock in and out so many times before that her employer had addressed the matter directly with her. She had been reprimanded for this consistent violation of the policy. She was the single worst offender in the company. She violated the policy so many times, that her employer had exacted a promise of Ms. Mason that she would not forget again. If this were a one time failure, these parties would not be before this Court.

The established fact is, that Ms. Mason repeatedly had failed to obey the rules of her employer. That failure, in and of itself, was sufficient to establish just cause for termination. The policy is necessary to prevent chaos in record-keeping by the employer. If the policy were allowed to go unenforced, it could lead to numerous labor violations or claims of labor violations by the employer. It is a significant and necessary part of the company's right to manage its affairs. And Ms. Mason was directly challenging and defying that right.

Additionally, however, she had another employee clock her in on July 23, 2003, a day when she admittedly **did not** work **after** she had made her promise. This also is just cause for termination. Although the ALJ found that the employee was told by a supervisor that she could have another employee clock her in on a day she was not at work, she did not advise the supervisor of her promise to the owner/employer when she allegedly obtained that permission. In short, she lied to get permission. If she wanted permission, she should have either gone to Mr. Timmons, or alternatively disclosed that the promise had been made to Mr. Timmons and had her supervisor ask him. She did neither.

Both of these are grounds for termination. There was a clear expectation of performance that could be easily met by Ms. Mason. She failed to do so on several levels providing the employer just cause for termination.

A. Ms. Mason is Culpable.

The employee is definitely culpable. Rule 994-405-202(1) states in pertinent part:

“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."

Utah Admin. Code 994-405-202(1) (2005).

It was Ms. Mason that failed to properly clock in and out on July 21, 2003. It was Ms. Mason, and no other person, that had promised her employer that she would not forget to do that again. It was Ms. Mason that went behind her employer's back to obtain "permission" to have another employee clock her in on a day she was not at work. The conduct causing the discharge was not a single isolated incident. It was a continued pattern of behavior for which she had been warned and for which she had promised to correct. Failure to clock in and out properly certainly jeopardizes an employer's rightful interests in having accurate records and avoiding chaos in their compliance with employment laws. It causes additional work to be done to correct those failures. It allows for the opportunity to be dishonest in reporting time. It makes the employer's records inaccurate. It creates an element of distrust between employer and employee. It further demonstrates blatant disregard for the employer's rules, regulations, and authority. It affects the ability to maintain discipline and order in an employer's workplace, which is culpability.

Utah Administrative Rules further provide that unemployment benefits can be denied for violation of employment rules, such as those violated by Ms. Mason. Pertinent portions of Rule 994-405-208 of the Utah Administrative Code provide significant insight.

“(1) Violation of Company Rules.

If an individual violates a reasonable employment rule and the three elements of culpability, knowledge and control are satisfied, benefits shall 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 worker believes a rule is unreasonable, the worker 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 worker 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.”

Utah Admin. Code 994-405-208(1) (2005).

It certainly is reasonable to require employees to clock in and out, and such a rule promotes the legitimate business interests of an employer, as mentioned above. Respondent has argued that this was a habitual offense, and that it was condoned by the employer. The offense was somewhat habitual as to this offending employee, having occurred fairly regularly over the course of the almost two years Ms. Mason worked for Harley Davidson.

But the employer never approved that practice and reprimanded her for the offenses. Ms. Mason was warned on many occasions that such conduct could not be tolerated. Only to that extent could it be argued that the fixing of the problem demonstrates “condoning” it. Ms. Mason also testified that Mr. Timmons required a promise of her to correct her performance. In other words, she was given notice the conduct would no longer be tolerated in accordance with paragraph (c) of those rules. *Id.* at ¶ (c).

Furthermore, she got other employees involved with the correction of her disobedience only amplifies that Ms. Mason was causing the employer to maintain necessary discipline. As paragraph (d) directly provides, that in and of itself establishes culpability. *Id.* at ¶ (d).

Were this a single incident of forgetfulness, the severity of forgetting to clock in and out might not be sufficient to warrant termination. That is not this case, however. So such an entirely hypothetical inquiry has no meaning here. The facts of the matter show that this was not a single incident. Culpability is certainly demonstrated.

Respondent argues this failure may somehow be relieved by the alleged “permission” she received from her supervisor to correct the failure. Breach of the promise to Mr. Timmons occurred long before she ever obtained the alleged permission from her supervisor to have another employee clock her in on a day she was not at work. That cannot have happened when she never even disclosed the promise to the supervisor.

Furthermore, this was not an isolated incident, the employee had repeatedly been warned to change this behavior. It was behavior of such an offensive nature and of such concern to the employer that the employer sought for and obtained from the employee a *promise* to never let it happen again. Therefore, there is no question the behavior was “continued or repeated” by the employee. The first element should unquestionably be met.

B. Ms. Mason Had the Requisite Knowledge.

The employee also had the required knowledge. Utah Administrative Code R994-405-202(2) defines 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.

Ms. Mason’s activities fit squarely within the definition provided for by the rule. Ms. Mason certainly had knowledge of the conduct expected. She had been warned on several occasions and had made a promise to properly clock in and out. At that time, as on prior occasions, she received a clear explanation of the expected behavior. The promise also demonstrates the

specific warning. There simply cannot be any question Ms. Mason knew she was to clock in and out properly.

The employer had made repeated requests and warnings to the employee to clock in and out correctly. This fact was referenced by the lower Court in its decision. She should have “been able to anticipate the negative effect of [her] conduct.” See Utah Admin. Code 994-405-202(2) (2005). Ms. Mason testified during the hearing she understood it was a problem for her to continue to fail to clock in and out correctly and both the employer and the supervisor had instructed her it was their expectation she correct that behavior. See Transcript p. 34, ln. 22-42. Additionally, Mr. Hill (another employee), the supervisor, and Mr. Timmons (the owner/employer) all testified that those conversations had taken place and Ms. Mason knew of their expectations in that regard. See Transcript p 13, ln. 20-31; p. 24, ln. 19-36; p. 30, ln. 1-2. Each of them testified Ms. Mason was repeatedly verbally warned she needed to clock in. When she failed to do so, and had another employee clock her in on a day when she was not even working, she was terminated. That culminating event, however, was after a long track record of failing repeatedly to conform to the requirements for employment. The employer gave a clear explanation of the expected behavior, warnings had previously been given, an ultimate warning given attached with a promise to correct the objectionable behavior. The fact she made this promise is ample evidence she had knowledge of the behavior which needed correcting. This satisfies the knowledge requirements.

C. Ms. Mason Had Control of Her Decisions.

The employee's conduct was also within her control, the third requirement for a just cause termination. Utah Admin. Code r994-405-202(3) defines control.

“(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.”

This was not an isolated instance. This was continued inefficiency and repeated carelessness.

The definition requires the required performance be reasonable. It would certainly seem reasonable for an employee who sells clothing and runs a cash register, to punch a time clock.

Millions of employees do that every day in this country. Imagine the chaos in the workplace if this policy is adopted in Utah. It will make Utah employment records suspect, because employees will no longer need to follow their employer's policy on accurate time record keeping. Ms. Mason had the ability to clock in and out correctly. If a review was made of

her overall performance of clocking in and out a very great percentage of the time would not show any error in that performance. She had the ability to do it correctly, nevertheless, she chose not to do so. Forgetfulness might have been an excuse prior to the first warning, maybe even the second, but such an excuse lacks credibility when it has been pointed out many, many times. Control over her performance is demonstrated. It was also promised. To not find that element satisfied is not reasonable.

II. Having Met All Requirements, Ms. Mason Was Terminated With Just Cause, and Benefits Should Be Denied.

Respondent lastly argues this is a situation where although discharge might have been appropriate, denial of unemployment benefits is not. The cases cited in support of that proposition are inapposite to this situation. In the case of *Buick v. Department of Employment Sec.*, 752 P.2d 358 (Utah Ct. App. 1988), the employee was discharged after failing to come to work and providing a questionable medical excuse for that failure. Judge Orme found that case to “just barely” be within the realm of rationality. *Id.* The possibility that there actually might have been a medical excuse allowed the Board to conclude unemployment benefits should be awarded. *Id.* Unlike this case, there was no immediately preceding warning to correct behavior, rather, the cause for termination was based upon one incident. It is not even “just barely” rational or reasonable not to find just cause when an employee directly breaches a commitment. To then obtain “permission” from another supervisor, without disclosing the commitment, only adds fuel to the fire. Those alone demonstrate just cause properly should have been found to terminate Ms. Mason.

Respondent next relies upon *Northwest Foods v. Board of Review*, 731 P.2d 470 (Utah 1986), to support the assertion Ms. Mason did not show volitional conduct in this case. In *Northwest Foods*, the employee, who had a history of inappropriate emotional outbursts while at work, was instructed to take a week long vacation. *Id.* Though she was not instructed to stay away from her place of employment during that week, when she visited her employment to pick up some personal items, her employer fired her. *Id.* Unlike in *Northwest Foods*, where the employee did not know she wasn't supposed to do something, Ms. Mason, was well aware of her promise. She simply chose to break it. Respondent states: "She simply forgot, on occasion, to use the time clock properly. Although she promised to do better, she forgot once more." See Respondent's Brief, p. 25. Those statements are not entirely true. Ms. Mason did forget to use the time clock properly, a failure for which she was warned specifically about. She did not promise just to do better, she promised to correct the behavior. This was after several warnings. The once more, in combination with the other issues that occurred, was not a small thing as Respondent argues. Nor was it outside of her volitional control. Forgetfulness at that point was not a valid excuse.

Respondent next cites *Logan Regional Hosp. v. Board of Review*, 723 P.2d 427 (Utah 1986). In that case, the employee was responsible for three mishaps while maintaining the boiler system of the Logan Regional Hospital. *Id.* The Board found that the mishaps were the result of mistakes or accidents, and therefore an element of fault was lacking. *Id.* In this case, the fault could only be attributed to Ms. Mason. Ms. Mason was the one responsible

to keep her promise. Ms. Mason was the one responsible for clocking in and out properly. She failed to do that, and the following sequence of events leads one to believe she attempted to cover-up that breach. Forgetfulness simply cannot be an excuse forever.

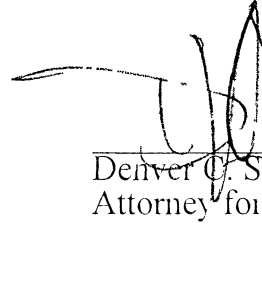
Petitioner demonstrate sufficient facts to satisfy each element for a finding of just cause surrounding the termination of Ms. Mason. The ALJ's holding was neither rational, nor reasonable. It rewards cunning and deceit. It initiates a very dangerous precedent for employers in Utah as they lose all hope of enforcing accurate record-keeping by their employees. All an employee has to do to get out of a commitment to their employer is find someone up the chain of command who will authorize the requested conduct and not disclose the promise they made. Deceiving that person in the chain of supervisors is fine, and any false or misleading manipulation will not matter so long as the employee can secure "permission" to violate the policy, the promise and continue the conduct which has provoked the warnings. Such a precedent is neither reasonable nor rational and it should not be upheld.

CONCLUSION

Pursuant to the foregoing arguments and law, Petitioner respectfully requests this Court overrule the award of unemployment benefits made in Respondent's favor. Having just cause for her termination, she should justly be denied any benefits resulting from her dishonest behavior.

DATED this 28 day of November, 2005.

NELSON, SNUFFER, DAHLE & POULSEN



Denver C. Snuffer, Jr.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **PETITIONER'S REPLY BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:

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on this 24 day of November, 2005.

