

2005

Irene Thomas v. Draper City and Appeal Board of Draper City : Petitioner's Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IRENE THOMAS, Petitioner, vs. DRAPER CITY and APPEAL BOARD OF DRAPER CITY, Respondents.	PETITIONER'S REPLY BRIEF Appeal No. 20050071-CA
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Petition for Review of Ruling of the City of Draper Appeal Board

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ARGUMENT

I. MS. THOMAS MARSHALED ALL THE EVIDENCE RELEVANT TO THE INSTALLATION OF THE VERITAS SOFTWARE.

In Ms. Thomas' opening brief, she conceded that the Court can "accept as true most of the Board's findings regarding how Ms. Thomas performed her job." Petitioner's Brief at 2. Because Ms. Thomas has not challenged the findings regarding the other alleged "misconduct," she was not required to marshal the evidence supporting those unchallenged findings. The only finding which Ms. Thomas has challenged is the Board's finding related to the "inappropriate installation and use of unlicensed Veritas back up software." Ms. Thomas marshaled the evidence related only to the Veritas finding, because this is the only factual finding that Ms. Thomas challenges in this appeal.

Despite the Board's finding that only "[t]he misconduct involving the Veritas back up software was sufficiently grievous that the Corrective Action principles and procedures of the City's Policies were not appropriate or required" (R. 00011), Draper claims that Ms. Thomas failed to properly marshal the evidence supporting the termination. Draper argues the Board must have factored in its decision to uphold her termination other "serious misconduct" of Ms. Thomas besides the Veritas installation. This argument ignores the plain language of the Board's specific finding. The Veritas installation was the only matter which the Board found to be "serious misconduct" allowing Draper to bypass its written policy of imposing progressive discipline. *See* R. 10, para. 14.A and B. Because this is the only factual finding challenged by Ms. Thomas,

there was no need for her to marshal the evidence related to the other findings. Ms. Thomas' opening brief correctly reviewed all of the evidence related to the erroneous finding and demonstrated why that finding was incorrect. The Court should refuse Draper's invitation to ignore the merits of Ms. Thomas' appeal for her "failure" to marshal facts not relevant to the issue presented in this appeal.

II. THE BOARD IMPROPERLY CONCLUDED THAT MS. THOMAS COMMITTED "SERIOUS MISCONDUCT"

The Board erred by concluding that the Veritas matter constituted "serious misconduct" warranting termination. The Board heard nothing which demonstrated that Ms. Thomas took any affirmative action which could be considered misconduct, much less "serious misconduct."

Black's Law Dictionary defines "misconduct" as follows:

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misbehavior, delinquency, impropriety, mismanagement, offense, *but not negligence or carelessness*.

Black's Law Dictionary, Fifth Edition. Accordingly, Ms. Thomas had to engage in affirmative "willful" action, not "negligence or carelessness" to engage in "misconduct." Here, there is no evidence which supports a finding of a willful act related to the Veritas issue. Indeed, Draper only argues that Ms. Thomas "had plenty of time to see" and that she "should have noticed" the "Blizzard icon." Draper Brief at 47. Draper does not, and cannot, argue that Ms. Thomas affirmatively installed the improper software or instructed

someone else to install the software. Draper does not even argue that Ms. Thomas saw the Blizzard icon and ignored it. Draper's claims about what Ms. Thomas "should have done," demonstrate the passive nature of her alleged wrongdoing. At worst, Ms. Thomas' action was negligent or careless. She did not install the Veritas software or direct Paul Despain to do so. Perhaps she should have noticed the improper installation, but she did not. Perhaps she was careless in this one instance, but carelessness or negligence are insufficient to establish misconduct.

While Draper claims there is "additional" evidence supporting the Board's finding of "serious misconduct" beyond that associated with the Veritas issue, that "additional" evidence still does not elevate Ms. Thomas' conduct to the level of even misconduct, let alone "serious misconduct." For example, Draper claims that Keck's testimony concerning Ms. Thomas' "odd behavior" and other testimony about her "strange" behavior supports such a finding. Draper also claims that Ms. Thomas' failure to show up for work "suggests that she may have been hiding something." Draper Brief, at 40-41. These "facts" appear to be a futile attempt to show some affirmative misconduct, because there is no evidence that Ms. Thompson affirmatively installed the Veritas software. Clearly, these "facts" are not "misconduct," much less evidence which could be used to support the Board's finding of "serious misconduct." Again, this conduct may be odd or strange, but it is not the type of willful action necessary to support the finding of misconduct.

III. THE BOARD FAILED TO CONSIDER PROGRESSIVE DISCIPLINE AND THE TOTALITY OF MS. THOMAS' EMPLOYMENT HISTORY.

Even if the Court assumes that Ms. Thomas was careless by not noticing that the Veritas software was improperly installed, the Court should still reverse the Board's decision because, as outlined above, that conduct does not rise to the level of "serious misconduct" allowing Draper to terminate Ms. Thomas without following its policy of progressive discipline. Draper claims "the City had no choice but to terminate Thomas" even though it had not followed its policy of progressive discipline. Draper Brief at 49. Draper would have this Court sanction the practice of stockpiling alleged offenses, failing to inform the employee of the offenses, failing to allow the employee the opportunity to correct those offense and then alleging that another offense combined with the prior undisciplined offenses constitutes "serious misconduct" warranting termination. Draper's position turns the entire concept of civil service upside down. Public employees have an expectation that they will be treated fairly and in accordance with their public employer's policies and procedures and in accordance with the protections provided by the State and Federal Constitutions. Based on Draper's policy and Utah case law, Ms. Thomas reasonably anticipated that Draper would give her an opportunity to correct any alleged performance deficiencies prior to being terminated.

While this Court has never directly addressed a case where a public employer's failure to follow progressive discipline was an abuse of discretion, it has recognized that

an employee subjected to progressive discipline, who does not correct the behavior, cannot complain that termination was an abuse of discretion. *Kelly v. Salt Lake City*, 8 P.3d 1048, 1055 (Utah App. 2000) (“The Chief had progressively disciplined Kelly. Kelly’s termination was the culmination of several instances of misconduct . . .”). Here, even if the Board considered other alleged “misconduct” by Ms. Thomas, it failed to consider whether progressive discipline short of discipline could have corrected the alleged misconduct. The failure to even consider progressive discipline constitutes an abuse of discretion. *See, e.g., Battiste v. Michigan Dep’t of Social Svcs.*, 398 N.W.2d 447, 450 (Mich. App. 1986) (“A single incident of misconduct may be so gross and egregious as to warrant dismissal. However, where an employee’s previous record is unblemished, we believe that a department’s failure to *consider* progressive discipline renders its decision-making arbitrary.”)

Moreover, the Board abused its discretion when it failed to follow this Court’s instruction to consider an employee’s entire employment history prior to affirming a termination decision. In *Ogden City Corp. v. Harmon*, 116 P.3d 973, 978 (Ut. App. 2005), the Court, “noted that an exemplary service record and tenuous evidence of misconduct may tip the balance against termination.” Here, Ms. Thomas presented ample evidence that she was a good employee who had never been disciplined. Draper agrees that Ms. Thomas was “a ‘nice person,’ who worked hard.” Draper Brief at 47. Draper does not dispute that the Board heard testimony from Ms. Thomas’ former supervisor that

she was a “good employee” who had “good values and ethics” and was “very loyal.” R. 932-4. Further, both her current supervisor and the City Manager testified that Ms. Thomas “worked hard.” R. 879. Moreover, it is undisputed that Draper never disciplined Ms. Thomas for *any* conduct prior to dismissing her. Despite this evidence, the Board failed to consider any of Ms. Thomas’ positive employment history when it affirmed the termination decision. The Court specifically noted in *Salt Lake City Corp. v. Salt Lake City Civil Service Comm’n.*, 2005 UT App 397, n.1 (Utah App. 2005), that the Board should “consider positive aspects of [her] employment history” when deciding whether the termination was proportional to the alleged offense. *See also Kelly*, 8 P.3d at 1055; *Lucas v. Murray City Civil Serv. Comm’n.*, 949 P.2d 746, 762 (Utah App. 1997). Terminating Ms. Thompson without providing her the opportunity to correct her behavior and without considering the totality of her employment record was an abuse of discretion.

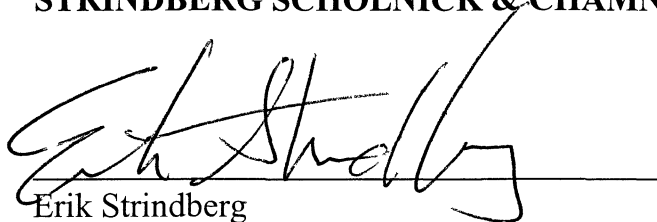
The failure to engage in this analysis is particularly harmful in this case given the “tenuous” nature of the alleged misconduct. *Harmon*, 116 P.3d at 978. Ms. Thomas did not engage in any affirmative action, but was at worst careless. Simply telling Ms. Thomas to carefully review all of the icons on her computer screen every morning would have corrected the concern. By failing to consider the “positive” aspects of Ms. Thomas’ employment history, the potential efficacy of other discipline and the tenuous nature of the alleged misconduct, the Board abused its discretion in upholding the termination.

CONCLUSION

Given the Board's errors, the Court should reverse the decision affirming Ms. Thomas' termination.

DATED this 24 day of April, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **REPLY**
BRIEF OF PETITIONER to be hand delivered, this 24th day of April, 2006 to:

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