

IN THE UTAH COURT OF APPEALS

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Mineral Resources	)	MEMORANDUM DECISION
International, Inc.,	)	(Not For Official Publication)
	)	
Petitioner,	)	Case No. 20080943-CA
	)	
v.	)	F I L E D
	)	(July 9, 2009)
Department of Workforce	)	
Services and Stephen R. Davis,	)	<span style="border: 1px solid black; padding: 2px;">2009 UT App 184</span>
	)	
Respondents.	)	

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Original Proceeding in this Court

Attorneys: Paul H. Johnson and Blynn A. Simmons, Ogden, for  
                  Petitioner  
                  Michael R. Medley, Salt Lake City, for Respondents

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Before Judges Thorne, Bench, and Davis.

BENCH, Judge:

Mineral Resources International, Inc. (Employer) petitions for judicial review of the Workforce Appeals Board's (the Board) decision granting unemployment benefits to Stephen R. Davis (Employee) based on the conclusion that Employee was not discharged for just cause because he was not culpable for his conduct. We affirm.

Employer does not challenge the factual findings entered by the Administrative Law Judge (the ALJ), which the Board affirmed and adopted in their entirety. We therefore accept the factual findings as complete and accurate. Accordingly, we review the issue on appeal as a mixed question of law and fact and "will not disturb the Board's application of law to its factual findings unless its determination exceeds the bounds of reasonableness and rationality." Southeastern Utah Ass'n of Local Gov'ts v. Workforce Appeals Bd., 2007 UT App 20, ¶ 6, 155 P.3d 932 (citing Johnson v. Department of Employment Sec., 782 P.2d 965, 968 (Utah Ct. App. 1989)).

A former employee is ineligible for unemployment benefits if he or she was discharged for just cause. See Utah Code Ann. § 35A-4-405(2)(a) (Supp. 2008). Just cause is established by proving three elements relating to the employee's conduct: culpability, knowledge, and control. See Utah Admin. Code R994-405-202(1)-(3). The only element of just cause at issue here is culpability.

To establish culpability, "[t]he conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest." Id. R994-405-202(1). A determination of culpability requires "balancing . . . the likelihood the conduct will be repeated against the seriousness of the offense and the harm to the employer." Gibson v. Department of Employment Sec., 840 P.2d 780, 784 (Utah Ct. App. 1992) (listing several factors that may be considered in the culpability balancing test). The harm to the employer may be either actual or potential, and potential harm may be shown from a single violation if it is serious or harmful enough. See Fieeiki v. Department of Workforce Servs., 2005 UT App 398, ¶¶ 3-4, 122 P.3d 706; see also Utah Admin. Code R994-405-202(1). Whether the employee is likely to repeat the conduct at issue may be determined by looking at "the employee's past work record . . . [and] length of employment." Gibson, 840 P.2d at 784. If an "employee has a clean work record" or a history of compliance indicating that "there is little chance the conduct [at issue] will be repeated, a more serious offense and more harm to the employer will be necessary to show culpability." Fieeiki, 2005 UT App 398, ¶ 2. But ultimately, "[t]he proper emphasis under the culpability requirement should not be upon the number of violations; rather, it should address the problem of whether the discharge was necessary to avoid actual or potential harm to the employer's rightful interest." Bhatia v. Department of Employment Sec., 834 P.2d 574, 578 (Utah Ct. App. 1992) (emphasis and internal quotation marks omitted).

The Board reasonably concluded that Employee was not discharged for just cause. The Board began its analysis under the culpability balancing test by determining the seriousness of the offense and the potential harm to Employer. The Board recognized that Employee's conduct of openly criticizing Employer's management of the company and discussing the company's financial stability was potentially harmful because the conduct could negatively affect employee morale. See generally Utah Admin. Code R994-405-211 (listing legitimate employer interests, including employee morale). The Board found, however, that

Employee had not disclosed specific financial information to any employees outside of his department but had discussed only general financial information, typically in response to questions by employees who were concerned about the company's financial stability. The Board, therefore, reasonably concluded that because Employee had not disclosed specific, confidential financial information, the potential harm from Employee's conduct was not so great as to require discharge.

The Board next determined the likelihood that Employee's conduct would be repeated. The Board considered Employee's four-year-long work history, in which there was only a single documented incident where Employee had been given a verbal warning to refrain from swearing. Employer argues that because Employee occasionally continued to swear after receiving this verbal warning, it is likely that he would also continue to openly criticize Employer's management of the company and discuss the company's financial stability. However, noncompliance with this single verbal warning for swearing is not conclusive evidence that Employee was likely to repeat the conduct at issue here.<sup>1</sup> The Board reasoned that Employer could have taken alternative action other than discharge in accordance with Employer's progressive discipline policy--such as issuing a formal warning or suspension--and concluded that Employee's conduct would likely improve in response to these alternative measures.

Ultimately, the Board concluded that the potential harm from Employee's conduct was not so serious to make discharge necessary to protect Employer's rightful interest and it was not likely

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<sup>1</sup>Although Employer looks to evidence in the record of other undocumented incidents, which arguably could have illustrated the likelihood that Employee would repeat the conduct at issue, the Board determined that such evidence was neither reliable nor competent and did not include that evidence in the factual findings or legal conclusions. Reviewing the accuracy of the Board's factual findings would require application of the substantial evidence test. See Tasters Ltd. v. Department of Employment Sec., 863 P.2d 12, 18 (Utah Ct. App. 1993); Johnson v. Department of Employment Sec., 782 P.2d 965, 968 (Utah Ct. App. 1989). Because Employer does not contest the Board's factual findings, we decline to conduct such a review.

Employee would repeat the conduct at issue. That determination does not exceed the bounds of reasonableness and rationality. Accordingly, we affirm.

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Russell W. Bench, Judge

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WE CONCUR:

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William A. Thorne Jr.,  
Associate Presiding Judge

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James Z. Davis, Judge