Kirk L. Whitcombe
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF ARIZONA

KIRK L. WHITCOMBE Plaintiff Vs. WASTE MANAGEMENT INC. Defendant's	CASE NO. CV07-0976 PHX ROS PLAINTIFFS' RESPONSE TO DEFENDANTS ANSWER AND MOTION FOR COURT TO ORDER DEFENDANTS' TO SET A TRIAL DATE ASAP.

Plaintiff's Complaint is true. The Defendants in their ANSWER failed to produce any evidence, documents, and reasoning, to show otherwise. The Defendant's were made well aware of Plaintiff's Complaint prior to terminating Plaintiff, as the Plaintiff's attached exhibits in this instant Complaint show. The Defendants were also made aware of Plaintiff's Complaint last year when Whitcombe presented his identical complaint in the Arizona Department of Economic Security, Office of Appeals adjudicative proceeding, that was decided September 28, 2006, attached

Ex. "A". The Office of Appeals the Office of Appeals rendered it's September 28, 2006 decision, producing "FINDINGS OF FACT" and "REASONING AND CONCLUSIONS OF LAW", where the Office of Appeals reasoned and concluded Waste Management had wrongfully terminated and discriminated against the Plaintiff. As noted in the Office of Appeals decision, the Office of Appeals informed Waste Management,

> "This Decision becomes final on October 13, 2006 unless you filed an appeal on or before that date. Instructions for filing an appeal are at the end of this decision." p.1

Waste Management never appealed, not did they make any attempt to mitigate the damages they have caused to Whitcombe. In response to this instant Complaint Waste Management's Answer offers no new information to convince anybody that they did not intentionally discriminate, black list and wrongfully terminate Whitcombe. wrongfully terminated and discriminated against Whitcombe.

CONCLUSION

As soon as this court decides on PLAINTIFF'S MOTION FOR JUDGE ROSLYN SILVER TO DISQUALIFY HERSELF FROM THE CASE", Plaintiff is ready to have a trial and therefore moves this court to Order the Defendant's to set a trial date as soon as possible so that Justice can be served.

As far as Plaintiff's are concerned there is no need for witness's, even though Whitcombe's allege the majority of the crew has stated their in support in

Whitcombe's cause. This case is about whether Defendant's factually intentionally discriminated, blacklisted, and wrongfully terminated Plaintiff that can be determined by review of the documents, facts, and claim Whitcombe produced in these court records, along with Whitcombe's forthcoming court testimony. Whitcombe's maintain this will be enough for the Court to make Findings of Facts and Conclusions of Law in rendering a decision of Due Course of Justice in Plaintiff's favor.

DATED This 14 day of June, 2007

Kirk L. Whitcombe Pro Se

Arizona Department of Economic Security

Office Of Appeals

207 E. McDowell Road, Phoenix, AZ 85004-1631 (602) 340-8447 FAX (602) 254-5375

In the Matter of:

KIRK L. WHITCOMBE
3303 W. TWAIN CT
ANTHEM, AZ 85086-1672

UNEMPLOYMENT SERVICES, L.L.C.
DBA WASTE MGMT AZ LANDFILLS, INC.
C/O TALX
P.O. BOX 749000
ARVADA, CO 80006-9000

Arizona Appeal No. U-1014692-001 Date of Mailing: 9/28/2006

Social Security No. 544-50-1623 Employer Acct. No. 5454130000

DECISION OF APPEAL TRIBUNAL

THE CLAIMANT REMAINS QUALIFIED
THE EMPLOYER'S ACCOUNT IS CHARGED

This Decision becomes final on October 13, 2006 unless you file an appeal on or before that date. Instructions for filing an appeal are at the end of this decision.

CASE HISTORY:

Effective Date of Initial Claim: 4/9/2006 Issue Code: 20
Date of Separation: 4/10/2006
Date of Determination: 8/10/2006
Appealed By: Employer
Date of Hearing: 9/25/2006
Place of Hearing: Phoenix, AZ
Appearances: Claimant; Employer Representative, Employer Witness

ISSUE:

Discharge (A.R.S. Section 23-775)
Chargeability of Benefits (A.R.S. Section 23-727)

FINDINGS OF FACT:

The claimant was last employed as a heavy equipment operator by the employer, a waste removal company and landfill operator prior to being discharged on April 10, 2006 because he had too many "critical rule violations," primarily accidents involving his operation of heavy equipment.

The claimant was hired on September 13, 2004 and worked full time at the employer's land fill operation. The employer has extensive policies and procedures, including what they characterize as "life critical rules." The claimant was aware of those policies. The employer also required extensive training and orientation, all of which the claimant successfully completed.

The employer also has a progressive discipline policy. For a first "Critical rule violation," an employee is to receive a verbal counseling. For the second, he is also to receive a verbal counseling. For a third in a twelve month, period he is to receive a written warning. For a forth "critical rule violation" or a FIRST "Life critical violation," they are to receive a final written warning and suspension. For a fifth critical or a second life critical violation, they are to be terminated. The employer has 10 life critical rules. In addition, heavy equipment operators are to maintain a 15-foot safe distance from personnel and vehicles. They are also expected to exercise authority over commercial haulers and transporters.

On July 1, 2005, the claimant was given a written warning for sleeping on the job. On or about July 15, 2006, the claimant was told by his supervisor to ride back to the working face of the landfill in the pickup truck with other employees. The claimant continued to walk back to his equipment because he wanted the exercise and did not wish to ride with the other employees, some of whom he did not get along with. Because of this refusal, the claimant was given a written warning on July 18. The supervisor alleged he was concerned about the claimant's exposure to the heat. Multiple employees typically spent time each afternoon pulling tarps over the exposed trash to keep it from blowing around after work hours. This activity also occurred during the heat of the day.

On July 4, the claimant supposedly had an accident by scraping a maintenance vehicle with his own. The claimant recalls no impact. Because the damage was minor, no counseling was done.

On October 6, the claimant supposedly had a second accident. After work, the equipment is typically grouped together for maintenance. On that date, they were clustered closer to the "working face" than normal. When the claimant arrived at work

before dawn, he had to remove his vehicle from the cluster. There was no lighting because someone had run over the lighting system the night before. Again, he recalled no impact when he backed his compactor out of the other vehicles and recalled no impact while compacting that day. He did recall running over a piece of debris that rocked upward and struck the grill of his compactor. There were apparently no other witnesses.

On November 7, 2005, the claimant backed a bulldozer into a truck that was preparing to dump trash in the area in which the claimant was working. After that incident, the employer changed their policy to require the traffic director to notify equipment operators when trucks were being sent into their working area. According to the claimant, the truck was backed into his area from a location he had no view of and he did not have time to stop before he struck the vehicle. After this incident, the employer changed their procedures to have the spotter notify equipment operators when he was sending trucks into their immediate area.

On March 31, the claimant was working a lower pad. Employer procedures prohibited equipment from a higher pad from crossing behind equipment on a lower pad. On that day, the operator on the higher pad crossed behind the claimant as the claimant was compacting the trash. As a result, the claimant backed into the other driver. Since this was his fourth accident, the claimant was discharged. The other driver was not disciplined.

REASONING AND CONCLUSIONS OF LAW:

The employer has contested a Determination of Deputy, which held the claimant discharged for reasons other than misconduct connected with the employment. This issue involves the application of Sections 23-775 and 23-727 of the Employment Security Law of Arizona.

Section 23-775 of the Arizona Revised Statutes provides in part:

> An individual shall be disqualified for benefits:
>
> * * *
>
> 2. For the week in which the individual has been discharged for willful or negligent misconduct connected with the employment, and in addition to the waiting week, for the duration of the individual's unemployment and until the individual has earned wages in an amount equivalent to five times the individual's weekly benefit amount otherwise payable.

Arizona Revised Statutes, Section 23-727, provide in pertinent part as follows:

C. Except as otherwise provided in subsections D, E, F and G of this section and sections 23-773 and 23-777, benefits paid to an individual shall be charged against the accounts of the individual's base-period employers. The amount of benefits so chargeable against each base-period employer's account shall bear the same ratio to the total benefits paid to an individual as the base-period wages paid to the individual by the employer bear to the total amount of base-period wages paid to the individual by all the individual's base-period employers.

D. Benefits paid to an individual whose separation from work with any employer occurs under conditions found by the commission to be within those prescribed by section 23-775, paragraph 1 or 2 or for compelling personal reasons not attributable to the employer and not warranting disqualification for benefits, shall not be used as a factor in determining the future contribution rate of the employer from whose employment the individual so separated, ...

Arizona Administrative Code, in Section R6-3-51190, provides in pertinent part as follows:

B. Burden of proof and presumption

1. The burden of proof consists of the requirement to submit evidence of such nature that, taking all other circumstances into account, the facts alleged appear to be true. When this burden has been met, the evidence becomes proof.

2. The burden of proof rests upon the individual who makes a statement.

    a. If a statement is denied by another party, and not supported by other evidence, it cannot be presumed to be true.

    b. When a discharge has been established, the burden of proof rests on the employer to show that it was for disqualifying reasons. This burden may be discharged by an admission by the claimant, or his failure or refusal to deny the charge when faced with it.

    c. An employer who discharges a worker and charges misconduct but refuses or fails to bring forth any

evidence to dispute a denial by the claimant does not discharge the burden of proof. It is important to keep in mind that mere allegations of misconduct are not sufficient to sustain such a charge.

Arizona Administrative Code, in Section R6-3-51300, provides in pertinent part as follows:

B. Accident

1. Accident is defined as "an event that takes place without one's foresight or expectation." A worker is expected to exercise that degree of ordinary care in proportion to the danger(s) inherent in the activity in which he is engaged.

2. When a worker fails to exercise ordinary care and an accident occurs, it establishes his negligence. The degree of negligence will determine whether there is misconduct. In determining the degree of negligence, the following should be considered:

    a. The worker's knowledge of the potential seriousness of damage that could result from his negligence.

    b. Whether he had been previously warned against negligent behavior which contributed to the final accident.

    c. Pressure under which the worker had to make decisions which contributed to the accident.

    d. Possibility for the claimant to have avoided the accident.

    e. Extent to which other responsible persons contributed to the accident.

Arizona Administrative Code, in Section R6-3-51485, provides in pertinent part as follows:

A. General

1. An employee, discharged for violating a company rule, generally is considered discharged for misconduct

connected with the work. This principle is based on the theory that when hired, an employee agrees to abide by the rules of his employer. This section covers rules peculiar to a particular employer, and not rules constituting the general code of industrial misconduct. In order for misconduct connected with the work to be found, it must be determined that the claimant knew or should have known of the rule and that the rule is reasonable and uniformly enforced.

2. Recognition must be accorded to the type of business in which the employer is engaged and other surrounding circumstances. The rule must be reasonable in light of public policy and should not constitute an infringement upon the recognized rights and privileges of workers as individuals. Rules to affect the employee's conduct outside the employer's premises and which could not reasonably affect the employer's interests are generally considered unreasonable.

The claimant was discharged on April 10, 2006. At issue is whether the discharge was for work related misconduct as defined by law.

The claimant, according to the employer, was discharged for violating the employer's "Multiple Safety Incidents Intervention Policy." This requires discharge after five "critical rule violations" or two "life critical violations." None of the six incidents which were testified too are in the employer's own list of "Life Critical Rules." The question then is whether the claimant had five or more critical rule violations. No where in the employer's voluminous Operations and Safety Rule Handbook is the term "critical rule" defined. The Tribunal therefor need only analyze the issue under the work performance and accident rules of the Employment Security Law.

Multiple acts of ordinary carelessness or accidents can qualify as work related misconduct. The first accident the claimant was supposedly involved in was so minor by even the employer standards that the claimant was written up. The second accident, if it occurred, was caused as much by the clustering of vehicles as the claimant's violation of a 15 foot clearance policy. The third accident involving the trash truck resulted in the employer modifying a procedure. Based on the claimant's eyewitness assertion that the trash truck "suddenly" appeared behind him without warning, poor procedures were at least as causative as the claimant. The fourth accident involved another driver violating employer policies by cutting behind the claimant. Again, any "blame" for the accident should be equally apportioned. The Tribunal also finds it noteworthy that the other driver received no discipline for a violation of this rule. The Tribunal finds that the employer has not met their burden of proof. Work related misconduct has not been established.

Therefore, the Administrative Law Judge concludes that the claimant was discharged for reasons other than willful or negligent misconduct in connection with the employment.

DECISION:

The employer's experience rating account shall be charged for benefits paid the claimant as a result of this employment.

The Determination of Deputy is affirmed. The claimant was discharged for reasons other than willful or negligent misconduct in connection with the employment. No penalty is applicable.

Steven R. Ockrassa
Administrative Law Judge

Distribution:
Claimant
Employer
BPC Phoenix 918B
Policy and Training Unit 720A
File

SO/ls

APPEAL/REOPENING DEADLINE: October 13, 2006

(ESTE DOCUMENTO AFECTA SU ELIGIBILIDAD PARA SEGURO POR DESEMPLEO. SI USTED NO LEE INGLES, COMUNIQUESE CON SU OFICINA LOCAL O BUSQUE QUIEN LE TRADUZCA)

APPEAL RIGHTS

THIS DECISION WILL BECOME FINAL UNLESS YOU TAKE FURTHER ACTION BY FILING A PETITION FOR REVIEW TO THE APPEALS BOARD IN WRITING, NO LATER THAN THE APPEAL/REOPENING DEADLINE STATED ABOVE.

IF YOU WISH TO APPEAL THIS DECISION, MAIL OR FAX THE APPEAL TO:

MAIL TO: **ARIZONA DEPARTMENT OF ECONOMIC SECURITY**
Office of Appeals
207 East McDowell Road
Phoenix, AZ 85004-1631

FAX TO: **(602) 254-5375**

YOU MAY ALSO TAKE YOUR APPEAL, OR MAIL IT, TO ANY UNEMPLOYMENT OFFICE IN THE UNITED STATES OR CANADA. FOR YOUR CONVENIENCE, AN APPEAL FORM IS ENCLOSED FOR YOU TO COMPLETE.

An appeal from an Appeal Tribunal decision is called a Petition for Review. The petition must be signed by the appellant or by the appellant's authorized agent. The petition for review may be based upon one or more of the following grounds:

a. Irregularity on part of presiding officer or other party to proceedings.
b. Abuse of discretion on part of hearing officer whereby petitioner was deprived of a fair hearing.
c. Newly discovered evidence which could not with reasonable diligence have been discovered and produced at time of original hearing.
d. There was error in admission or exclusion of evidence in Tribunal hearing.
e. There was error in law in Tribunal hearing.
f. Other good and sufficient grounds.

Appealed cases are initially referred by the Appeals Board Chairman to a single member for review. If an interested party objects to review by one member, the matter shall be heard by three members of the Appeals Board. If you object to a one-member review, your objection must be in writing.

HOW YOUR PETITION FOR REVIEW WILL BE PROCESSED: If you file a timely petition for review, we will transcribe the hearing tapes into written form. If you want your own copy of the hearing tapes or of the transcript, you must request your copy within the 15 days allowed to appeal from this decision. Parties who request copies of the hearing tape or of the transcript will be notified of the fees charged for preparing the copies, which are $5.00 per hearing tape and $0.15 per page of the hearing transcript (unless you cannot afford it).

You may request an extension of time to file a supplement to the petition for review. An extension request MUST BE MADE AT THE TIME THE PETITION IS FILED, and must identify, in specific terms, why the extension is necessary.

If the reason for your extension request is to obtain a transcript of the Appeal Tribunal hearing in order to prepare your supplement, you may not delay filing the petition beyond the fifteen days allowed by law merely because you are waiting for a transcript. You will be notified as soon as possible of the preparation costs for your copy of the transcript, and the transcript will become available after payment is made. If you have followed the instructions regarding preparation costs, you will be granted an automatic

extension so that your supplement to your previously-filed petition will be due within fifteen (15) calendar days from the date the transcript is mailed or delivered to you. If you ask for a copy of the transcript without also asking for additional time to file your supplement, no automatic extension will be granted. No extension of time beyond this automatic extension is permitted, unless a written request is filed with the Appeals **Board at 1140 East Washington, Suite 104, Phoenix, AZ, 85034-1051, or by fax at (602) 253-9473,** and is approved by the Appeals Board. As with any extension request, you must identify why the extension is necessary, in specific terms.

CLAIM FILING. If you are a Claimant who remains unemployed, you should continue to file your weekly claims while any appeal of this case is pending. If you have questions regarding the filing or payment of claims, you should contact your local office.

RIGHT TO BE REPRESENTED. You may have someone represent you. If you pay your representative, that person must be a licensed Arizona attorney or must be supervised by a licensed Arizona attorney. An employer may also use any employee of the business as its representative. Representatives are not provided.

ALTERNATIVE FORMATS: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Presiding Administrative Law Judge at (602) 340-8447.

MAIL PETITION TO: ARIZONA DEPARTMENT OF ECONOMIC SECURITY
Office of Appeals
207 East McDowell Road
Phoenix, AZ 85004-1631

OR FAX TO: (602) 254-5375

A. PETITION FOR REVIEW OF APPEAL TRIBUNAL DECISION

I, _____, petition for review of the decision of the Appeal Tribunal in appeal number 1014692.

I believe the decision is wrong for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(Attach additional sheets as needed)

Signature: _____ **Date:** _____

Current Mailing Address: _____
(Street address)

_____
(City) *(State)* *(Zip Code)*