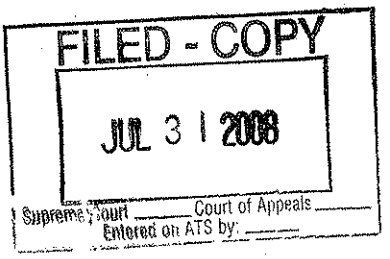
7-31-2008

Chapman v. NYK Line North America, Inc. Appellant's Brief Dckt. 35014

IN THE SUPREME COURT OF THE STATE OF IDAHO

MERRIE E. CHAPMAN, Claimant-Appellant, vs. NYK LINE NORTH AMERICA INC. Employer-Respondent and IDAHO DEPARTMENT OF LABOR Respondent	)	NO. 35014 APPELLANT'S BRIEF



BRIEF OF APPELLANT

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION

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STATEMENT OF THE CASE

Nature of The Case

The Appellant Ms. Merrie Chapman (herein after Ms. Chapman) appeals from the Idaho Industrial Commission's Decision and Order in this case of January 9, 2008 which upheld the Appeals Examiner's Decision of November 2, 2007.

Statement of the Facts and Course of the Proceedings

In May of 2007, NYK North America Inc. (herein after NYK) established an Integrity Hotline to be used to report unethical or illegal activity within NYK; and, that the complaint would be investigated by a neutral third party. Ms. Chapman took advantage of the new channel of communication to voice several complaints. (Tr., p.10 Ls. 7-8, p.51 Ls. 13-25, p.52 Ls. 1-3)

On July 18, 2007, Ms. Chapman returned to work from her honeymoon and was advised by Ms. Mishelle Garner (herein after Ms. Garner) to report to Ms. Sarah Stevens (herein after Ms. Stevens). (Tr., p. 51 Ls. 7- 12) Ms. Chapman reported to Ms. Stevens as directed. Ms. Stevens advised Ms. Chapman that NYK had hired an attorney to represent her for the investigation. With a puzzled look Ms. Chapman asked Ms. Stevens "NYK had hired me a lawyer?" (Tr., p. 51 Ls. 11-14) Ms. Stevens replied, "Yes for the investigation and you have to see your lawyer Ms. Tamsen Leachman (herein after Ms. Leachman) at 2 p.m. today." Ms. Chapman found this to be rather strange so she asked again "NYK hired me a lawyer?" And Ms. Stevens again responded, "Yes," and for the investigation. Ms. Chapman asked Ms. Stevens if should she have her own attorney accompany her and listen in with this lawyer that NYK had hired for her, and Ms. Stevens responded

that there was no need since NYK had hired the lawyer for her. (Tr., p. 51 Ls. 7- 14, p. 52 Ls. 14-17.)

At approximately 1:00 p.m. on July 18, 2007, and acting on the advice of people she trusted, Ms. Chapman purchased a tape recorder from the downtown Boise, Idaho Office Depot. Ms. Chapman advised the salesperson that she needed a tape recorder and he led her to an aisle where there were several choices. Ms. Chapman advised the salesperson that she needed a recorder that had clear sound but was not too expensive. The sales person informed Ms. Chapman that the SONY 570V had the best clarity and selected that recorder for Ms. Chapman. The salesperson eventually concluded the purchase. After completing the sale, the salesperson, opened the package, put the batteries and tape in the recorder, handed Ms. Chapman the recorder and said "You are all set, have a great day." Ms. Chapman asked, "I'm recording now?" and then placed the recorder in the bottom of her purse and proceeded to have lunch. Ms. Chapman then went to the location that Ms. Stevens had given her to see the lawyer. (Tr., p. 52 Ls. 4- 25, p. 53 Ls. 1-9, 21-25, Tr., p. 54 Ls. 24-25, Tr., p. 55 Ls. 1-4 .) (R., p. 29.)

On July 18, 2007, at approximately 2:00 p.m., Ms. Chapman was met by a Ms. Leachman. (Tr. p. 55 Ls. 12.) Ms. Leachman led Ms. Chapman into a conference room. Ms. Chapman asked what Ms. Leachmans' role in the investigation was. Ms. Leachman advised Ms. Chapman that she would be conducting the investigation for NYK. (Tr., p. 55 L. 25, p. 56 Ls. 1-2.) Ms. Chapman, confused, stated that she had been informed that NYK had hired a lawyer?) for her. (Tr., p. 56 Ls. 5-6.) Before the interview began, Ms. Chapman

specifically asked the investigator if she could tape record the conversation as she was unprepared for the interview and had no documentation with her. (Tr., p. 56 Ls. 9-10.) Ms. Leachman was very emphatic in denying Ms. Chapman permission to tape the interview. (Tr., p. 56 Ls. 15-21.)

The interview had been going on approximately one (1) hour. (Tr., p. 67 Ls. 9-17.) It was about this time that Ms. Leachman started interrogating Ms. Chapman about Ms. Chapman's annual reviews. It was Ms. Leachmans' contention that ever since 1990, Ms. Chapman had been counseled about substandard performance. Ms. Chapman disagreed with her assessment and Ms. Leachman said she needed to retrieve the evaluations and she left the room. (Tr., p. 58 Ls. 16-25. p. 59 Ls. 1-4.)

Ms. Chapman had been a "one pack" a day smoker for over twenty (20) years and that she had quit smoking in January of 2007, and always carried Nicorette chewing gum to help her through those times when she craved a cigarette. (Tr., p.57 Ls. 23-25, p. 58 Ls. 1-3, and 9-15.) During part of the time that Ms. Leachman was out of the room, Ms. Chapman feeling very nervous and her body craving for nicotine, began digging through her purse for a piece of Nicorette gum. Ms. Chapman had frantically turned everything up side down in her purse and was finally able to find the gum. (Tr., p. 59 Ls. 12-25, p. 60 Ls. 1-4.) Ms. Leachman returned to the room approximately four (4) minutes after she had left. (Tr., p. 60 Ls. 5-13.) When Ms. Leachman returned, the interview continued. About one-half hour after resuming the interview, Ms. Leachman and Ms. Chapman both heard a loud beep. Ms. Chapman thought it was an alarm of some sort and asked in a very surprised manner what the noise was. Ms. Leachman looked at Ms. Chapman and

said that was your tape recorder. Ms. Chapman said it was not and that the recorder was not even on. (Tr., p. 60. Ls. 17-25, p. 61 Ls. 1-10, p.67 Ls. 18-25.)

Ms. Leachman moved on with more questions and then requested that Ms. Chapman take her recorder and rewinds it. Ms. Chapman did as requested. Ms. Leachman requested that Ms. Chapman push play, and Ms. Chapman complied. Ms. Leachman then asked is that us, and Ms. Chapman responded that she did not know and Ms. Chapman added that she did not know how to even use the tape recorder. (Tr., p. 60. Ls. 15-22, p. 61 Ls. 21-22) Ms. Chapman then offered the tape to Ms. Leachman. (Tr., p. 61 Ls. 24-25.) Ms. Leachman indicated that she wanted the tape and Ms. Chapman gave it to her. (Tr., p. 31 Ls. 1-2.) Ms. Leachman let Ms. Chapman know that she was very disappointed and upset as she felt that she had been lied to. (Tr., p. 31 Ls. 7-11.) Yet, Ms. Chapman apologized to Ms. Leachman indicating the recording was an accident. (Tr., p. 40 Ls. 13-16.) The total interview was about three hours in duration. (Tr., p. 36 Ls. 8-12) The total amount of the interview that was taped was thirty (30) minutes in length. (Tr., p. 41 Ls. 23-25, p. 42 Ls. 1-5.) Ms. Chapman's interview ended with Ms. Chapman again apologizing for part of the interview being taped which was not her intent. (Tr., p. 63 Ls. 10-16.) On July 19, 2007, at approximately 5:50 p.m., Ms. Chapman was terminated from her employment with NYK. (Tr., p. 64 Ls. 4-13) The rationale provided for the termination was that Ms. Chapman had failed to comply with an investigation. (Tr., p. 64 Ls. 17-18)

On July 20, 2007, Ms. Chapman applied for unemployment benefits and received an eligibility determination in her favor on August 3, 2007. (R. Exhibit 3)

On August 14, 2007 NYK timely requested an appeal of the August 3, 2007 Eligibility Determination. (R. Exhibit 4) On October 23, 2007, a telephonic hearing was held on NYK appeal of the Eligibility determination. (Tr., p. 1 Ls. 1-16) On November 11, 2007 the Appeals Examiner reversed the eligibility determination [1] (R., p. 1) having concluded that Ms. Chapman intentionally recorded the meeting with Ms. Leachman after agreeing not to, that Ms. Chapman did not provide a plausible explanation for the existence of the words at the beginning of the tape to wit, "OK, I'm recording now.", that Ms. Chapman had intentionally recorded the meeting and as Ms. Chapman had just purchased the recorder on her lunch hour, that Ms. Chapman did not provide a credible explanation as to when and how the statement, "OK, I'm recording now," was recorded prior to the meeting. (R., p. 4) Ms. Chapman appealed the Decision of the Appeals Examiner on November 16, 2007. (R., pp. 8-12) On November 27, 2007, in compliance with Idaho Employment Security Law (R.A.P.P.) Rules 4(A), 6 (A) and (B), Ms. Chapman requested permission to file a brief within the requisite period delineated by the rule. (R., pp. 15-18) On December 3, 2007, the Industrial Commission issued an order establishing the briefing schedule and denying Ms. Chapman's request for hearing. (R., pp.21-23) On January 9, 2008, the Industrial Commission issued its Decision and Order in this case affirming the decision of the Appeals Examiner. (R., p. 38) Ms. Chapman timely appealed the decision of the Industrial Commission on February 19, 2008. (R., pp. 49 – 52)

[1] It must be noted that page 1 of the transcript records the date as October 23, 2008; however, the actual date of the Appeals Examiner's hearing was October 23, 2007.

ISSUE

Did The Industrial Commission Abuse Its Discretion In Denying An Evidentiary Hearing Requested By Ms. Chapman?

ARGUMENT

The Industrial Commission Abused It Discretion When It Denied Ms. Chapman A Hearing To Consider Additional Evidence Not Presented At The Appeals Examiners Hearing Because The Operation Of The SONY 570V Tape Recorder Was Critical In Determining Whether The Activation Of The Tape Recorder Was Done Deliberately Or Accidentally.

A. Introduction

In compliance with Idaho Employment Security Law (R.A.P.P.) Rules 4(A), 6 (A) and (B) Ms. Chapman requested permission to file a brief within the requisite period delineated by the rule. (R., p. 15) Additionally, Ms. Chapman requested that a hearing to consider additional evidence not presented at the Appeals Examiners Hearing be granted. The specific rationale and explanation provided for a hearing was as follows:

> ...to enable the Industrial Commission to examine a SONY 570V tape recorder which has the Voice Operated Recording (VOR) feature with tape. This tape recorder will be presented as evidence in addition to the evidence that was presented to the Hearing Officer.
>
> ***The proposed evidence is relevant as it is central to the Appellant's claim that she did not engage in any misconduct as the tape recorder can be and was activated inadvertently in the manner described by Appellant,*** in Exhibit 20 and in the Hearing of October 23, 2007.
>
> The reason the SONY 570V tape recorder was not presented before the Hearing Examiner was because it would have required the purchase of two additional recorders (one for the Hearing Examiner and one for the Respondent) and it would have been impossible, given the location of all parties to demonstrate just how the recorder could have been accidentally activated.

> Aside from reviewing the proposed evidence, the hearing will allow the Industrial Commission to raise questions concerning the evidence and points of clarification raised through Appellant's and Respondent's brief submitted per R.A.P.P 4(A). (Emphasis added.)

(R., p. 16)

The Industrial Commission issued an order establishing the briefing schedule and denying Ms. Chapman's request for hearing. Of importance to this appeal, the Industrial Commission in denying the requested hearing said the following:

> In her request, Claimant states that she requests an appeals hearing with the Commission in order that she is able to demonstrate how a tape recorder operates. ***However, Claimant has not demonstrated that the only way in which the Commission can understand the functioning of the tape recorder at issue is to actually view it.*** After a careful review of the issue, we are satisfied that the tape recorder and its operation can be accurately and sufficiently explained through the documentary appeals record.
>
> The Commission takes the position that conducting a new hearing at this level of review is an extraordinary measure and should be reserved for those cases when due process or other interests or justice demand no less. ***Claimant had a full and fair opportunity to present evidence supporting its contentions about her separation from employment.*** Therefore, we find no reason to conduct an additional hearing in this case to allow either party to present additional evidence. Accordingly, Claimant's request for a new hearing is DENIED. (Bold and italic emphasis added) (R., p. 22)

The Industrial Commission issued its decision and order affirming the decision of the Appeals Examiner denying benefits to Ms. Chapman. (R., p. 38) In its decision and order, the Industrial Commission correctly surmised that there was:

> [N]o material dispute about the essential facts above giving rise to Claimant's discharge. ***However, Employer asserts that Claimant intentionally recorded part of the interview after agreeing not to do so; while Claimant asserts it was an accident, and not misconduct*** for the purpose of denying unemployment insurance benefits. (R., pp. 41-42) (Emphasis added.)

The Industrial Commission found that Ms. Chapman's recording the interview without permission constituted a failure to comply with the subject investigation; and, that "secretly" recording the interview after Ms. Chapman agreed that she would not jeopardize the integrity of the interview, and thus the investigation. (R., pp. 43) Further the Industrial Commission found that found that there was "no plausible explanation for why her [Ms. Chapman's] voice can be heard at the beginning of the 30-minute recording stating "Ok, I am recording now." and that the onus was on Ms. Chapman to prove that she did not deliberately "an otherwise inactivated recording device." (R., p. 45) Finally, the Industrial Commission concluded that:

> Claimant [Ms. Chapman] obstructed the investigation and compromised the integrity of it by ***surreptitiously recording*** the interview without authorization. In so doing, she deliberately disregarded employer's rules. She also violated the standards of behavior that Employer has a right to expect from its employees. Therefore, we conclude that Employer has met its burden of demonstrating that it discharged Claimant [Ms. Chapman] for misconduct connected with her employment. (R., p. 46) (Emphasis added.)

B. Standard of Review

In reviewing a decision by an appeals examiner, the record before the Industrial Commission is the same as that considered by the appeals examiner, "unless it appears to the commission that the interests of justice require that the interested parties be permitted to present additional evidence." I.C.§ 72-1368(7). The Industrial Commission's decision to permit or exclude evidence not raised before the examiner is discretionary.[2] Id.; *Teevan v. Office of the Attorney General,*

[2] In determining whether the Industrial Commission has abused it discretion, the court employs a three part test: (1) whether the Commission correctly perceived the issue as one of discretion, (2) whether it acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) whether it reached its decision by an exercise

130 Idaho 79, 81, 936 P.2d 1321, 1323 (1997). A party before the Industrial Commission does not possess "the unbridled right to present a substantially new case, absent some showing as to why the evidence had been unavailable earlier." *Teevan,* 130 Idaho at 81, 936 P.2d at 1323 (quoting *Rogers v. Trim House*, 99 Idaho 746, 750, 588 P.2d 945, 949 (1979)).

The Industrial Commission is empowered to "decide all claims for review filed by any interested party in accordance with its own rules of procedure not in conflict [with other law]." The "Rules of Appellate Practice and Procedure under the Idaho Employment Security Law" adopted by the Industrial Commission require a party requesting a new hearing to submit with its request:

> 1. the reason for requesting the hearing;
>
> 2. whether the party desires to present evidence to the Industrial Commission in addition to that presented to the appeals examiner;
>
> 3. a description of the evidence the party desires to present;
>
> 4. an explanation of why the proposed evidence is relevant to the issues before the Industrial Commission; and
>
> 5. reason why the proposed evidence was not presented before the examiner.

R.A.P.P. 6(B).

Excell Const., Inc. v. State, Dept. of Labor 141 Idaho 688, 693, 694 116 P.3d 18, 23, 24 (2005) overturned on other grounds.

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of reason. *Super Grade, Inc. v. Idaho Dept. of Commerce and Labor* 144 Idaho 386, 162 P.3d 765, 769 (2007).

C. The Industrial Commission Abused Its Discretion When It Failed To Grant A Hearing As Requested By Ms. Chapman And Thereby Denying Ms. Chapman The Opportunity To Present Credible Evidence That She Did Not Intentionally Activate The SONY 570V Tape Recorder

The issue central to the decisions of the Appeals Examiner and the Industrial Commission was did Ms. Chapman accidentally record thirty (30) minutes of the interview with the investigator as she claimed or did Ms. Chapman purposely attempt to record the entire interview but was foiled in her attempt to do so only capturing thirty minutes of the second hour of the interview?

The record reveals that Ms. Chapman was unfamiliar with any recording devices (Tr., p. 53 Ls.12-18.) and was therefore unfamiliar with the capabilities of the SONY M570 micro cassette recorder. (Tr., p.54 Ls. 4-24, p. 61 Ls. 21-22, p. 65 Ls. 5-24) Ms. Leachman also lacked experience in using recording devices, (Tr., p. 37 Ls. 11- 25, p. 38 L. 3), she also had no familiarity with the SONY 570V (Tr., p. 39 Ls. 21-25, p.40 Ls. 1-2, p. 42 Ls. 5-10.) There was no evidence offered by either party to suggest neither that Ms. Leachman lacked credibility nor that Ms. Chapman was any less credible than Ms. Leachman. Ms. Leachman maintained that the recording was made on purpose and provides her rationale. However, Ms. Chapman maintained that she did not possess the technical expertise or familiarity with the recording device to conceive nor implement a plan to surreptitiously record the interview (Exhibit 19). Additionally, it is known that Ms. Leachman did not even attempt to examine the recorder to see if the explanation provided by Ms. Chapman was plausible. (Tr., p. 62 Ls. 4-10.)

Ms. Chapman, knowing that the functioning of the SONY 570V tape was central to her appeal to the Industrial Commission, requested that a hearing be granted for the reasons that have been delineated above. Incredibly, and notwithstanding the state of the record, the commission in denying the request opined that Ms. Chapman failed to demonstrate that the only way the Industrial Commission could understand the functioning of the SONY 570V tape recorder was to actually view it. (R., p. 22)

The Industrial Commission in stating the following:

> The Commission takes the position that conducting a new hearing at this level of review is an extraordinary measure and should be reserved for those cases when due process or other interests or justice demand no less. (R., p. 22)

Correctly perceived that the issue to grant a hearing in this matter was one of discretion. In this case, Ms. Chapman satisfied all of the requirements of R.A.P.P. 6(B). Additionally, Ms. Chapman clearly articulated that the proposed evidence is relevant as it is central to Ms. Chapman's claim that she did not engage in any misconduct as the tape recorder could be and was activated inadvertently in the manner described by Appellant in Exhibit 20 and in the Hearing of October 23, 2007.

There is no requirement in the rules of the Industrial Commission that burden an appellant seeking a hearing to show that the hearing requested is the only way the Commission could understand the evidence that the appellant wished to introduce into evidence. In placing this heretofore unknown requirement on Ms. Chapman, the Industrial Commission was acting outside the boundaries of it discretion.

In this matter, the Industrial Commission also reached its decision though the lack of an exercise of reason. The Industrial Commission opined that the Ms. Chapman had "a full and fair opportunity to present evidence supporting its contention about her separation from employment." (R., p. 22) The latter position is unreasonable given the facts of the case. Ms. Chapman explained in her request for a hearing that it was impracticable to present the evidence as follows:

> The reason the SONY 570V tape recorder was not presented before the Hearing Examiner was because it would have required the purchase of two additional recorders (one for the Hearing Examiner and one for the Respondent) and it would have been impossible, given the location of all parties to demonstrate just how the recorder could have been accidentally activated. (R., p.16)

Given the fact that the Appeals Examiner's hearing was conducted telephonically, and given the facts that there was no way the finder of fact could be shown the recorder, have the functions describe to him, have the fact finder inspect and handle the recorder in the presence of all parties, the above rationale provided by Ms. Chapman of not presenting the tape recorder at the hearing is compelling. Further, and perhaps most importantly, it was impossible for the fact finder to view a demonstration of how the SONY 570V tape recorder could be activated as described by Ms. Chapman at the hearing. Given that the key issues in this case are the very likely possibility that the SONY 570V tape recorder was activated exactly as described by Ms. Chapman and that contrary to the conclusion of the Industrial Commission, Ms. Chapman did not surreptitiously recording the interview without authorization the Industrial Commission's decision not to grant a hearing is inexplicable and without reason.

The Industrial Commission also had access to Exhibit 19. While Exhibit 19 is not evidence, it clearly articulates that Ms. Chapman had every motive to comply with the investigating authority as the investigation was triggered by a complaint filed by her. Yet despite Exhibit 19 and the entire transcript of the hearing, the decision of the Industrial Commissioned turned on its erroneous belief that the evidence demonstrated that Ms. Chapman had intentionally taped the interview with Ms. Leachman and therefore engaged in misconduct. (R., pp. 38-48) With all the foregoing in mind, it must be concluded that denying Ms. Chapman the opportunity to present the evidence requested at a hearing in light of the facts available to the Industrial Commission can only be characterized as simply unreasonable.

ISSUE

Did The Industrial Commission Have Substantial And Competent Evidence To Affirm The Appeals Examiner's Decision That Ms. Chapman Had Engaged In Misconduct And Was Therefore Ineligible To Receive Unemployment Benefits Because Of A Deliberate Disregard Of Her Employer's Rule Or Ms. Chapman's Conduct Failed To Meet A Standard Of Behavior Expected By Her Employers?

ARGUMENT

The Industrial Commission Did Not Have Substantial And Competent Evidence To Affirm The Appeals Examiner's Decision That Ms. Chapman Had Engaged In Misconduct And Was Therefore Ineligible To Receive Unemployment Benefits Because Of A Deliberate Disregard Of Her Employer's Rule Or Ms. Chapman's Conduct Failed To Meet A Standard Of Behavior Expected By Her Employers

A. Introduction

Idaho Code § 72-1366(5) provides that a claimant is ineligible for unemployment insurance benefits if that individual's unemployment resulted from the claimant's discharge for employment-related misconduct. In regard to a termination the pivotal issue for determination is whether the reasons for discharge constituted

"misconduct" connected with the claimant's employment such that the claimant can be denied unemployment benefits. *Beaty v. City of Idaho Falls*, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986) and the employer has the burden of proving this misconduct.

The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. *Appeals Examiner of Idaho Dept. of Labor v. JR. Simplot Co.*, 131 Idaho 318, 320,955 P.2d 1097, 1099 (1998). A "preponderance of the evidence" simply means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not. *Edwards v. Independence Services*, Inc., 140 Idaho 912, 915, 104 P.3d 954, 957 (2004). (R., p. 41) Given the record before the Industrial Commission, the record does not support a finding of misconduct as Ms. Chapman did not deliberately disregard any rule of her employer as the recording was unintentionally made and Ms. Chapman's conduct did not fall below the standard of behavior that her employer could have reasonably expected. *See Dietz v. Minidoka County Highway Dist.*, 127 Idaho 246, 248, 899 P.2d 956, 958 (1995)

B. Standard of Review

The standard of review in an appeal from the Industrial Commission was recently articulated:

> "On appeal from the Industrial Commission, this Court exercises free review of the Commission's legal conclusions, but will not disturb findings of fact if they are supported by substantial and competent evidence." *Steen v. Denny's Rest.*, 135 Idaho 234, 235, 16 P.3d 910, 911 (2000) . ***"Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a***

> ***conclusion***." *Uhl v. Ballard Med. Prods.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). "The conclusions reached by the Industrial Commission regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous." *Excell Constr., Inc. v. State, Dept. of Labor,* 141 Idaho 688, 692, 116 P.3d 18, 22 (2005) (citing *Hughen v. Highland Ests.*, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002)). We will not re-weigh the evidence or consider whether we would have drawn a different conclusion from the evidence presented. Id. (Emphasis added)

Giltner, Inc. v. Idaho Dept. of Commerce and Labor, 145 Idaho 415, 179 P.3d 1071, 1074 (2008).

C. Ms. Chapman Did Not Intentionally Secretly Record The Interview

The micro cassette recorder in question is a SONY 570V tape recorder which has a built in "Voice Operated Recording (VOR) feature that activates the recorder on sound. (Exhibit 19., p. 8) This micro cassette recorder features the three (3) standard large buttons that are common on most micro cassette recorders. However, unlike most micro cassette recorders, one does not have to depress two buttons to record. All that needs to happen is for the, "record button" to be set to on and the VOR button to be activated. (Exhibit 19., p. 8) Given the capabilities of the SONY 570V it is not only possible but is more probable than not that the explanation provided by Ms. Chapman as to how the micro cassette recorder was in advertently activated is indeed true. The glaring deficiency in this case is that the Industrial Commission failed to grant a hearing where the tape recorder could have been examined.

It is known from the record that Ms. Chapman has no experience with tape recorders of any sort. (Tr., p. 53 Ls. 2-18, p. 54 Ls. 4-8) (Exhibit 19. pp. 6 and 7)

Prior to being interviewed, Ms. Chapman asked permission to make a recording of the interview (Tr., p. 56 Ls. 9-10) and such permission was refused. (Tr., p. 56 Ls. 15-21) It is also known that when the "beep" sound was made by the recorder, that Ms. Chapman was surprised and thought the sound was a fire alarm. (Tr., p. 60 Ls. 17-24). Contrary to the baseless conclusions of the investigator in regard to Ms. Chapman looking a like a kid who had been caught with "their hand in a cookie jar." (Tr., p. 29 Ls. 18-20) or that Ms. Chapman had a "sort of guilty look on her face" (Tr. p. 30 L. 6) there is no evidence in the record for anyone to conclude that Ms. Chapman was anything but genuinely surprised that the tape recorder had been running.[3]

D. Ms. Chapman Did Provide A Plausible Explanation For Why Her Voice Could Be Heard Saying On The Tape "OK, I'm Recording Now."

Central in the rationale for finding misconduct in this matter is the decision of the Industrial Commission that Ms. Chapman did not provide a plausible explanation for why Ms. Chapman's voice could be heard at the beginning of the tape saying "Ok, I am recording now." (R., p. 49) However, the following lines from the transcript are germane:

13 A I didn't understand. I'm sorry.
14 Q Okay. When you talk about the Sony M570 --
15 A Right.
16 Q -- tape recorder, was that -- was that based on

[3] During the hearing, counsel for Ms. Chapman objected to the investigator's characterization of Ms. Chapman's countenance in any form as an expression of guilt. (Tr., p. 29 Ls. 21-25, p. 30 Ls. 1, and Ls. 7-8) It is submitted that if looking guilty were to be given any weight in any proceeding then a number of innocent and non-culpable or non-liable persons would have been wrongly adjudged. The fact that the Idaho Industrial Commission gave credence and weight to the investigators statement is by the criteria delineated herein an abuse of discretion. (R. p. 45)

the name of it, was that based on knowledge you had found out later or knowledge that you found out at the time you purchased the tape recorder?

A I bought the Sony, because Sonys are generally clearer for anything. So, it's a *good* name.

Q Did the -- did the sales person explain any of the features to you about this -- about this recorder?

A He (unintelligible) and I remember standing there, he put everything together, and he just looked at me and said, okay, you're good to go. And I said I'm recording now kind of thing. I don't know. It was one of those -- I'm recording now? And he said there you go, you're good to go. And that was it. And I shoved it in my purse.

(Tr., p. 54 Ls. 13-25, p. 55 Ls. 1-3)

The record that was before the Industrial Commission and the above testimony show that Ms. Chapman provided a more than plausible reason for the critical words, "Ok, I'm recording now" appearing on the tape.

E. Ms. Chapman Did Not Deliberately Disregard Her Employer's Rule Of Complying With An Investigation and Ms. Chapman's Conduct Did Not Fall Below The Standard Of Behavior That Her Employer Could Have Reasonably Expected

Upon meeting the investigator and prior to the start of her interview, Ms. Chapman requested and was denied permission to record the interview session. In compliance with the denial, Ms. Chapman then placed the micro cassette recorder

in her purse and participated fully in the investigation process. The first hour went by without incident. During the second hour of the interview process, and to Ms. Chapman's surprise, the micro cassette recorder, through sound indicated that the tape had stopped. Ms. Chapman, based on her knowledge of tape recorders, gave a very plausible reason why the tape had inadvertently turned on. Ms. Chapman surrendered the tape as requested and completed another one and a half hour of interview. Therefore, and in compliance with the request of NYK, Ms. Chapman had complied with the investigation for the entire three (3) hour period that she was interviewed. Additionally, any request of Ms. Chapman made by the investigator was immediately complied with including the request to not tape the interview. (R., Exhibit 19, p. 7)

As an employer, NYK has a right to expect that its employees follow all policies that do not conflict with any laws or public policy. Although what acts or omissions constitute a failure to comply with an investigation are not delineated in any NYK policy that has been presented as an exhibit, it is not unreasonable to conclude that an employer could expect that an employee who is requested to participate in an internal investigation do the following at a minimum:

- Arrive on time for the interview;
- Be courteous to the investigator;
- Answer all questions truthfully;
- Comply with the administrative directions given by the investigator; and
- Complete the interview and not leave the interview until dismissed.

There is no doubt that Ms. Chapman participated in this investigation well within the standard of behavior expected by NYK. When the "end of tape" signal sounded much to the surprise of Ms. Chapman, she complied with every request the investigator made in regard to the inadvertent incident which covered only thirty minutes of a three (3) hour session. (Tr., p. 41 Ls. 4-11.) (R., Exhibit 19, p. 11)

CONCLUSION

It has been shown herein that the Industrial Commission perceived that granting Ms. Chapman a hearing was within its discretion. It has also been shown that the Industrial Commission in denying Ms. Chapman's request for a hearing acted outside the outer boundaries of its discretion and reached its decision without reason. Further it has been shown that the Industrial Commission did not have substantial and competent evidence in the record to conclude that Ms. Chapman, deliberately disregarded her employer's rule nor did Ms. Chapman's behavior fall below a standard that could have been expected by her employer. Ms. Chapman respectfully requests this Court to reverse the decision of the Industrial Commission in its totality. In the alternative, Ms. Chapman respectfully request this Court remand this case to the Industrial Commission for a hearing before that Commission where Ms. Chapman will be allowed to present the evidence she requested in her November 27, 2007 Petition to File Brief and Request for Hearing. (R., p. 16)

DATED this 31st day of July 2008.

R. A. (RON) COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July, 2008, I caused to be served a true and correct copy of the foregoing by the following method to:

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