

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BERKSHIRE, SS.

SITTING 1997

DENNIS TUPER,
Plaintiff-Appellant

v.

NORTH ADAMS AMBULANCE SERVICE, INC.
Defendant-Appellee

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT

BRIEF OF THE DEFENDANT-APPELLEE,
NORTH ADAMS AMBULANCE SERVICE, INC.

JOHN B. STEWART (BBO #551180)
Counsel for Appellee
MORIARTY, DONOGHUE & LEJA, P.C.
1331 Main Street
Springfield, MA 01103
Ph. (413) 737-4319

TABLE OF CONTENTS

I. ISSUES OF LAW 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT

 A. THE APPLICATION OF COLLATERAL ESTOPPEL WOULD
 DRASTICALLY ALTER THE OPERATION OF THE
 UNEMPLOYMENT COMPENSATION SYSTEM 4

 B. EMPLOYERS' LACK OF INCENTIVE TO FULLY
 PARTICIPATE IN UNEMPLOYMENT PROCEEDINGS
 PRECLUDES THE APPLICATION OF COLLATERAL
 ESTOPPEL 5

 C. COLLATERAL ESTOPPEL SHOULD NOT APPLY BECAUSE
 THE BURDEN OF PROOF SWITCHED FROM THE EMPLOYER
 (IN D.E.T. PROCEEDINGS) TO THE THE EMPLOYEE
 (IN A CIVIL ACTION) 7

 D. THE TRADITIONAL ELEMENTS OF COLLATERAL ESTOPPEL
 WERE NOT SATISFIED 8

 E. THE LEGISLATIVE MANDATE PROTECTING THE
 CONFIDENTIALITY OF UNEMPLOYMENT INFORMATION
 WOULD BE VIOLATED IF COLLATERAL ESTOPPEL EFFECT
 WAS AFFORDED TO D.E.T. DECISIONS 11

 F. THE APPLICATION OF COLLATERAL ESTOPPEL WOULD
 ABRIDGE NAAS' CONSTITUTIONAL RIGHT TO A JURY
 TRIAL 12

 G. THE ISSUE OF "JUST CAUSE" WAS NOT NECESSARILY
 FAIRLY LITIGATED IN THE D.E.T. PROCEEDINGS 13

IV. CONCLUSION 15

V. ADDENDUM

VI. SUPPLEMENTAL APPENDIX

TABLE OF AUTHORITIES

I. Cases

Almeida v. Travelers Ins. Co., 383 Mass. 226 (1981) 8

Bd. of Educ. of Covington v. Gray, 806 S.W.2d 400
(Ky.App. 1991) 5

Boothby v. Texon, 414 Mass. 468, 480-481 (1993) 7

California Department of Human Resources Development
v. Java, 402 U.S. 121, 135 (1971) 4

Caras v. Family First Credit Union, 688 F.Supp. 586
(D.Utah 1988) 6

Clapper v. Budget Oil Co., 437 N.W.2d 722 (Minn. 1989) 12

Civitarese v. Gorney, 358 Mass. 652, 656 (1971) 10

Dalis v. Buyer Advertising, Inc., 418 Mass. 220, 222 (1994) .. 12

Ferris v. Hawkins, 660 P.2d 1256 (Ariz. App. 1983) 4

General Electric Co. v. Div. of Employment Security,
349 Mass. 207 (1965) 4

Hillman v. Arkansas Hwy. & Transp. Dept., 39 F.3d 197
(8th Cir. 1994) 9

Johnson v. Kolman, 412 N.W.2d 109 (S.D. 1987) 9

LePage v. Bumila, 407 Mass. 163 (1990) 6

Mack v. South Bay Beer Distr., 798 F.2d 1279
(9th Cir. 1986) 4, 6

Mahon v. Safeco Title Ins. Co., 245 Cal.Rptr. 103
(Cal.App. 1988) 6

Martin v. Ring, 401 Mass. 59 (1987) 10

Matter of Sunshine Jr. Stores, Inc., 178 B.R. 286
(Bkrptcy.M.D.Fla. 1994) 9

McClanahan v. Remington Freight Lines, Inc.,
517 N.E.2d 390 (1988) 5

McClendon v. Indiana Sugars, Inc., 108 F.3d 789
(7th Cir. 1997) 7

Milton Bradley Co. v. Magdelene Diamantis, No. 85-0099-F
(D.Mass. October 9, 1986) 4

<u>Mitchell v. Jewell Food Stores</u> , 568 N.E.2d 827, 6 Ind. Emt. Rts. Cas. 244, (Ill. 1990)	8
<u>Nickens v. W.W. Grainger, Inc.</u> , 645 F.Supp. 569 (W.D.Mo. 1986)	6
<u>Salida School Dist. R-32-J v. Morrison</u> , 732 P.2d 1160 (Colo. 1987)	5
<u>Sevigny's Case</u> , 337 Mass. 747 (1958)	10
<u>Shovelin v. Central New Mexico Elec. Coop.</u> , 850 P.2d 996 (N.M. 1993)	6
<u>Slack v. Kanawha County Housing Authority</u> , 423 S.E.2d 547 8 Ind. Emt. Rts. Cases 75 (W.Va. 1992)	11
<u>Swineford v. Snyder County, Pa.</u> , 15 F.3d 1258 (3d Cir. 1994)	4, 5
<u>Whitehall v. Barletta</u> , 404 Mass. 497, 502 (1989)	7

II. Constitution and Statutes

Massachusetts Declaration of Rights, Article 1, Section 15 ...	12
G.L. c. 151A, §14	6
G.L. c. 151A, §25(e)(2)	7
G.L. c. 151A, §§39-41	5
G.L. c. 151A, §46	11

III. Other Authorities

Restatement (Second) of Judgments, §27	10
Restatement (Second) of Judgments, §28(4)	7
Restatement (Second) of Judgments, §28(5)	6

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I. Issues of Law

A. Whether a discharged employee who is determined to be eligible for benefits by the DET may use collateral estoppel offensively in a later wrongful termination action to preclude his employer from contesting whether he was fired for just cause.

B. Whether the court erred in denying an employee's motion in limine to prevent his employer from offering proof of the employee's insubordination and failure to follow his superior's order, based the collateral estoppel effect of a DET determination the employee was not fired for wilful misconduct and violation of a uniformly enforced work rule.

C. Whether the court erred in precluding any reference to DET proceedings and a DET decision granting the plaintiff unemployment benefits.

II. Statement of the Case

A. Prior Proceedings

This wrongful termination of employment action was commenced in Superior Court on November 23, 1994. The plaintiff's complaint set forth claims for defamation, breach of employment contract and interference with contract against NAAS and others, and demanded \$250,000 in damages. (SA-4-6). After discovery and summary judgment proceedings which limned the plaintiff's claims to a single contract count against NAAS, the case was called to trial on February 20, 1997. Prior to jury selection, the court (Spina, J.) heard argument on the parties cross-motions in limine regarding the effect an unemployment determination made by the Department of Employment and Training ("DET") granting the

plaintiff benefits. On issue preclusion grounds, the plaintiff moved to preclude NAAS from offering evidence the plaintiff was insubordinate or disobeyed a direct order of his superior, and that the jury should be instructed to accept the plaintiff was not insubordinate and did not disobey his superior's order. (A-1). Conversely, NAAS' motion sought to preclude admission of the DET decision as well as any references to unemployment proceedings. (A-10).

Judge Spina made an oral ruling:

I am going to deny the motion of the plaintiff for the motion in limine. I don't think that the issues are identical. I think the subjective state of mind of the employee, Dennis Tuper, was what was at issue in the unemployment hearings, and what is at issue here is the subjective state of mind or motivation, or it could be, of the employer, North Adams Ambulance Service, Inc.

(A-28).

The court also allowed NAAS' motion, and granted the plaintiff's request that his rights be preserved as to the disposition of both motions. (Id.) The case was then tried to a jury which returned a verdict for the defendant, answering "no" to the first special question: "<h>as the plaintiff sustained his burden of proving the termination of his employment by the defendant was not for just cause?" (A-55). After judgment on the jury verdict had entered, the plaintiff filed a timely notice of appeal from the court's rulings on the parties' motions in limine.

B. Relevant Facts

The plaintiff had an employment contract with NAAS providing he would act as an "EMT coordinator" from January 1, 1993 until December 31, 1994; his contract provided his employment "may only

be terminated for just cause." (A-30). On July 27, 1993, NAAS fired the plaintiff for violating NAAS policy in refusing to obey the order of a superior. (A-33). NAAS' policy provided a violation of an order may result in termination. (SA-2-3 <17, 20-22>; A-30). The plaintiff applied for and was ultimately awarded unemployment benefits. Initially, a DET hearing officer determined NAAS had met its burden of proving by substantial and credible evidence that the plaintiff's discharge was attributable to deliberate misconduct in wilful disregard of a reasonable and uniformly enforced rule or policy of the employer, and the employee's violation was not shown to be a result of the employee's incompetence. (A-7-8). The plaintiff appealed that determination and the DET board of review reversed, awarding him benefits. The board accepted the hearing officer's factual findings, but found the ultimate finding constituted an error of law, stating:

The claimant, a fifteen year employee, was entitled to know that his reservations about teaching a class were being interpreted as insubordination for which he risked discharge. As the claimant was not informed he would be discharged for disobeying a direct order, his action cannot be deemed in wilful disregard of the employing unit's interest <.> <T>he employer never set forth an explanation pertaining to the following of orders and the subsequent consequence of contesting orders. The claimant's actions do not rise to the level of insubordination, but rather appear to be a breakdown in communication. As such, the claimant neither violated the employer's rule or policy, nor acted with deliberate misconduct in wilful disregard of the employing unit's interest. Within the provisions of Section 25(e)(2), the claimant cannot be disqualified from receiving benefits.

(A-9).

Neither party filed a complaint for judicial review of the board's decision.

III. Argument

A. THE APPLICATION OF COLLATERAL ESTOPPEL WOULD DRASTICALLY ALTER THE OPERATION OF THE UNEMPLOYMENT COMPENSATION SYSTEM

If unemployment compensation decisions will be binding in later wrongful termination actions, employers will be encouraged to litigate--and litigate to the hilt--at the agency level and beyond. Courts have observed that where unemployment decisions may be binding liability-wise employers will approach every unemployment hearing as if it encompassed all the issues involved in a potential civil suit. Mack v. South Bay Beer Distr., 798 F.2d 1279, 1284 (9th Cir. 1986); Ferris v. Hawkins, 660 P.2d 1256, 1260 (Ariz. App. 1983); Swineford v. Snyder County, 15 F.3d 1258, 1269 (3d Cir. 1994).

The articulated purpose of the Employment Security Act are to provide substantially contemporaneous benefits to persons who are out of work through no fault of their own. General Electric Co. v. Div. of Employment Security, 349 Mass. 207 (1965). There is a federal mandate that unemployment determinations be made promptly. California Department of Human Resources Development v. Java, 402 U.S. 121, 135 (1971). Cf. G.L. c. 151A, §§39-41 (setting expedited timelines for initial decision, hearings and board of review decisions).

A federal court in Massachusetts has observed affording collateral estoppel effect to unemployment benefit determinations in later litigation would likely undermine the policy of prompt determination of benefits. Milton Bradley Co. v. Magdelene Diamantis, No. 85-0099-F (D.Mass. October 9, 1986) (SA-13). The

court quoted from the report and recommendation of then-Magistrate
(now U.S. District Judge) Michael A. Ponsor:

Any employer who foresaw even the possibility of litigation with a discharged employee would be required, to protect its own interests and to avoid the <collateral estoppel> impact of an adverse decision on any future lawsuit, to litigate unemployment compensation claims to the hilt, with full appeals. No authority is offered for such an irrational and destructive result.

(SA-7)

This same rationale—that the purposes of unemployment claims systems will be undermined conferring a collateral estoppel effect upon those administrative decisions—has been accepted in several other jurisdictions. See Swineford v. Snyder County, Pa., 15 F.3d 1258, 1268 (3d Cir. 1994) (Pennsylvania law); McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390, 395, 2 Ind. Empt. Rts. Cas. 1888, 1892 (Ind. 1988); Salida School Dist. R-32-J v. Morrison, 732 P.2d 1160, 1164-65 (Colo. 1987) (collateral estoppel would frustrate underlying purposes of unemployment act); Bd. of Educ. of Covington v. Gray, 806 S.W.2d 400, 403 (Ky.App. 1991).

B. EMPLOYERS' LACK OF INCENTIVE TO FULLY PARTICIPATE IN UNEMPLOYMENT PROCEEDINGS PRECLUDES THE APPLICATION OF COLLATERAL ESTOPPEL

Collateral estoppel ought not to apply against a party who "did not have an adequate . . . incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments, §28(5)(c) (A.L.I. 1982). "The amount in controversy in the first action may have been so small that preclusion would be plainly unfair." *Id.*, comment j. In this case, the plaintiff's demand for relief was \$250,000. (SA-4-6). By comparison, the amount at stake in the unemployment claim was trifling. See G.L.

c. 151A, §14 (setting forth formula for assessments based on claims experience of employers).

In another context, a "responsible" finding for running a red light was not given a preclusive effect in a later motor vehicle tort action when the motorist charged was only facing a \$40 non-criminal fine. The fine was "not of the degree that would give him every incentive to defend the prosecution vigorously and take an appeal. Thus, it would be unfair to allow the use of offensive collateral estoppel in the circumstances of this case." LePage v. Bumila, 407 Mass. 163, 167 n.4 (1990) (citations omitted).

Other courts considering this issue have found that an employer's lack of incentive to litigate fully at the agency level warrant denying an unemployment decision collateral estoppel effects. See Shovelin v. Central New Mexico Elec. Coop., 850 P.2d 996, 1002, 8 Ind. Empl. Rts. Cas. 654, 658 (N.M. 1993) (Collateral estoppel denied where Amount at controversy in unemployment proceeding was "small indeed when compared to the amount that <plaintiff> could possibly have been, and eventually was <\$107,000>, awarded by the jury in the breach of contract action."); Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1284 (9th Cir. 1986); Nickens v. W.W. Grainger, Inc., 645 F.Supp. 569, 571 (W.D.Mo. 1986) (Missouri law); Mahon v. Safeco Title Ins. Co., 245 Cal.Rptr. 103 (Cal.App. 1988); Caras v. Family First Credit Union, 688 F.Supp. 586, 590 (D.Utah 1988) (applying Utah law).

C. COLLATERAL ESTOPPEL SHOULD NOT APPLY BECAUSE THE BURDEN OF PROOF SWITCHED FROM THE EMPLOYER (IN D.E.T. PROCEEDINGS) TO THE THE EMPLOYEE (IN A CIVIL ACTION)

Collateral estoppel does not apply where "the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action . . . <or where> the burden has shifted to his adversary. Restatement (Second) of Judgments, §28(4) (emphasis added). In unemployment proceedings, it is the employer's burden to prove the employee's disqualification for benefits as a result of wilful misconduct or violation of a uniformly applied work rule, and not owing to incompetence. G.L. c. 151A, §25(e)(2). In a civil action alleging wrongful termination, it is the employee's burden to prove he was discharged without just cause. See Boothby v. Texon, 414 Mass. 468, 480-481 (1993).

In practical terms, applying collateral estoppel would mean that an employer who barely fails to satisfy his burden of proof in unemployment proceedings will be conclusively bound by that slim failure in a subsequent civil action where the burden of proof has completely switched to the other side. Applying equitable factors in deciding whether to allow offensive use of collateral estoppel, Whitehall v. Barletta, 404 Mass. 497, 502 (1989), would hardly seem fair.

The difference in the burden of proof between unemployment proceedings and a later civil action is reason enough not to allow the offensive use of collateral estoppel. See e.g. McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 798 (7th Cir. 1997) (burdens of proof in unemployment and retaliatory discharge claim were

"distinctly different," justifying lower court's refusal to accord unemployment decision evidentiary weight in summary judgment proceeding).

D. THE TRADITIONAL ELEMENTS OF COLLATERAL ESTOPPEL WERE NOT SATISFIED

As articulated in Almeida v. Travelers Ins. Co., 383 Mass. 226 (1981), the elements necessary to preclude relitigation of an issue are "identity of a cause of action and issues, the same parties, and judgment on the merits by a court of competent jurisdiction. . . .
<E>ven if the causes of action are not identical, under the doctrine of collateral estoppel . . . the decision of the <administrative agency> is conclusive as to previously litigated issues essential to the decision, if the remaining elements identified above are satisfied." Id., at 229-230.

There was no "identity of a cause of action." The unemployment proceeding was convened to make a specific determination of the plaintiff's eligibility under a statute. The wrongful termination cause of action had entirely different essential elements. Under its statutory authorization, the DET has limited jurisdiction to adjudicate unemployment claims. The wrongful termination claim determined whether a breach of certain contractual language had occurred. These two different claims cannot properly be characterized as the same cause of action. Cf. Mitchell v. Jewell Food Stores, 568 N.E.2d 827, 836, 6 Ind. Empt. Rts. Cas. 244, 248 (Ill. 1990) ("Whether plaintiff committed 'misconduct' under the <unemployment> Act is not the same question

as plaintiff has raised in the instant suit, namely whether his termination was based on 'just cause'; collateral estoppel denied).

In NAAS' view, the issues tried in the DET proceeding and the wrongful termination case lacked sufficient identity to warrant the application of collateral estoppel. Moreover, the adjudicatory proceedings conducted by DET lacked sufficient formality to warrant resultant findings to determine conclusively the parties' rights in later litigation. Finally, it was not within the DET's statutory jurisdiction to determine misconduct and/or violations of rights by employers.

The issues before the factfinders in the unemployment proceedings and the later civil action were simply different. The unemployment case focused exclusively on the conduct of the employee, while the civil action judged the reasonableness of the employer's conduct. The subjective intentions of the employee was controlling in DET proceedings. In the wrongful termination case, the jury had to weigh the objective needs of a reasonable employer. Cf. Hillman v. Arkansas Hwy. & Transp. Dept., 39 F.3d 197, 199-200 (8th Cir. 1994) (unemployment determination regarding employee "misconduct" was not the same issue as "just cause"). Since the issues were different, there can be no confidence the issues were actually litigated as necessary for collateral estoppel. Cf. Matter of Sunshine Jr. Stores, Inc., 178 B.R. 286, 289-290 (Bkrptcy.M.D.Fla. 1994) (Florida law) (no collateral estoppel where discharge was "for cause" was not litigated in unemployment proceeding). Accord, Johnson v. Kolman, 412 N.W.2d

109 (S.D. 1987) (no res judicata where issues not raised in unemployment proceeding and over which agency did not have jurisdiction).

The adjudicatory standards diverged as well. For instance, if an employee's failure to comply with work rules or obey orders was the result of incompetence, he is entitled to benefits. However, an employer may fire an employee for incompetence without incurring contractual liability for an unjust termination. The unemployment hearing focused on the possible misconduct of the employee, while the lawsuit considered the employer's motives and justifications for the firing.

Under traditional collateral estoppel principles, no preclusive effect may be accorded to issues that are not essential to a determination of the employee's eligibility for benefits. Restatement (Second) of Judgments, §27. It was not essential to the unemployment determination for the DET to find NAAS' state of mind when the plaintiff was fired, and therefore the plaintiff's motion in limine urging the court to preclude NAAS from offering evidence the plaintiff was insubordinate or did not follow orders was appropriately denied.

This case is distinguishable from Martin v. Ring, 401 Mass. 59 (1987), where this court approved of the defensive use of collateral estoppel arising out a determination of the Department of Industrial Accidents. In Martin, it was determined that no causal relationship existed between the plaintiff's workplace incident and his alleged injuries. There was a similarity between the cause of action in the workers' compensation proceeding and

his third party action, and the issues of medical causation in the cases were identical. The standards of medical proof were identical. Compare Sevigny's Case, 337 Mass. 747 (1958) and Civitarese v. Gorney, 358 Mass. 652, 656 (1971). The burden was on the plaintiff/employee in both proceedings to prove by a preponderance of the evidence that his back injury was caused by a certain accident. As noted above, these similarities between the agency proceeding and the court case were not present in the plaintiff's claims against NAAS.

Courts elsewhere have found a lack of identity of issues and adjudicatory standards justified their refusal to apply collateral estoppel to DET determinations. See e.g. Slack v. Kanawha County Housing Authority, 423 S.E.2d 547, 558 & n. 13, 8 Ind. Empt. Rts. Cases 75, 82 (W.Va. 1992) (where issues and adjudicatory standards are not identical, collateral estoppel was inappropriate).

E. THE LEGISLATIVE MANDATE PROTECTING THE CONFIDENTIALITY OF UNEMPLOYMENT INFORMATION WOULD BE VIOLATED IF COLLATERAL ESTOPPEL EFFECT WAS AFFORDED TO DET DECISIONS

Section 46 of Chapter 151A of the General Laws provides as follows:

Except as provided in this section, information secured pursuant to this chapter is confidential and for the exclusive use and information of the department in the discharge of its duties. Such information is not a public record nor admissible in any action or proceeding, except as provided in this section.

The exceptions set forth in the statute are (1) actions and proceedings in criminal prosecutions for violation of federal law; (2) information the DET is required to disclose to the U.S. Internal Revenue Service necessary to administer federal

unemployment taxes; (3) information the DET may disclose pursuant to section 65 of chapter 151A; and (4) information the DET may exchange with the U.S. Departments of Health and Human Services and Housing and Urban Development. There is no statutory exception for the use of unemployment information in wrongful termination claims.

Information gathered in DET proceedings is not intended to be used for any purpose other than fulfilling the DET's legislative mandate. While the statute is not explicit that DET decisions are not to otherwise affect the rights of the parties, its intent is unmistakable. Cf. Clapper v. Budget Oil Co., 437 N.W.2d 722, 726-727 (Minn. 1989) (construing similar statutory language as justification to deny collateral estoppel). As a matter of logic and common sense, it is hard to square the General Court's intention that the raw data upon which unemployment decisions are based would be inadmissible with the notion the ultimate decision could be determinative in higher stakes disputes elsewhere.

F. THE APPLICATION OF COLLATERAL ESTOPPEL WOULD ABRIDGE NAAS' CONSTITUTIONAL RIGHT TO A JURY TRIAL

In its answer to the plaintiff's complaint, NAAS demanded a jury trial. (SA-12, prayer 2). Since there is no right to a jury in DET proceedings, the application of collateral estoppel would effectively deprive an employer of its right to have a jury decide the fact-bound question whether an employee was fired for just cause, or some other reason. This would be a violation of an employer's right to a jury trial guaranteed in the Declaration of Rights, Pt. 1, Art. 15. Dalis v. Buyer Advertising, Inc., 418

Mass. 220, 222 (1994). If the DET's administrative determination the plaintiff was not discharged for wilful misconduct is binding, NAAS would effectively lose its right to have a jury evaluate whether the plaintiff has proven he was discharged for other than just cause; this would be an unconstitutional deprivation of NAAS' sacred right to a jury trial. Judicial economy should not be used as the basis to deprive a party of constitutionally guaranteed rights.

G. THE ISSUE OF "JUST CAUSE" WAS NOT NECESSARILY FAIRLY LITIGATED IN THE DET PROCEEDINGS

In his brief, the plaintiff argues the scope of the DET proceedings were necessarily limited to (1) whether the plaintiff was insubordinate or disobeyed a direct order as a matter of fact, and (2) whether this was "deliberate misconduct in wilful disregard of <NAAS'> interest, or . . . <a> knowing violation of a reasonable and uniformly enforced <NAAS> rule or policy." The plaintiff contends the DET hearing officer's found the only grounds cited in NAAS' termination notice--insubordination and failure to follow an order--did not exist, he could not have been terminated for "just cause." Stated otherwise, in the plaintiff's view the issue of "just cause" was actually litigated and the issues were similar enough to warrant application of collateral estoppel principals.

The plaintiff's argument misses the mark. It was for NAAS to disprove the plaintiff was not insubordinate in the DET proceedings, yet in the civil case it was the plaintiff's burden to prove his firing was not justified. A jury based on the instructions given in this case was best able to judge the

legitimate needs of a paramilitary organization, and whether the failure to obey an order was grounds for termination even if the plaintiff did not contemporaneously realize he was making a career decision in refusing to do what he was told. The employment contract did not contain any provision requiring the plaintiff be given such forewarning. In its written termination notice, NAAS was not required to give any reason or grounds whatsoever so long as it has just cause. As noted above, the crucial differences in the burden of proof allocation between the administrative and court proceedings warrants DET findings not to be preclusive elsewhere. An employee's administratively determined subjective state of mind should not be determinative of whether objective just cause exists for termination; a jury might well find (as the one which heard this case did) that notwithstanding the plaintiff's professed lack of understanding of the consequences of his refusal to obey his supervisor's order, that refusal constituted:

. . . a reasonable basis for employer dissatisfaction with an employee, . . . entertained in good faith for reasons such as lack of capacity or lack of diligence or failure to conform to usual standards of conduct, or some other culpable or inappropriate behavior . . . <or> grounds for discharge ◊ reasonably related in the employer's honest judgment to the needs of the employer's business . . . <rather than> unreasonable grounds or arbitrary or capricious discharge or discharge made in bad faith.

(A-10) (jury charge on "just cause").

IV. Conclusion

For all the foregoing reasons, NAAS respectfully requests the court to affirm the court's order on the parties' motions in limine and the judgment in favor of NAAS.

NORTH ADAMS AMBULANCE SERVICE,
INC., Defendant-Appellee

By JOHN B. STEWART (BBO #551180)
MORIARTY, DONOGHUE & LEJA, P.C.
1331 Main Street
Springfield, MA 01103
(413) 737-4319