
**APPEAL OF TEXAS WORKFORCE COMMISSION DECISION TO DENY
UNEMPLOYMENT BENEFITS TO MIKE SMITH**

SEPTEMBER 4, 2003

CLAIMANT:

**MIKE VINCENT SMITH
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Dallas, Texas 75001**

(469) 321-4321 – Home

**Social Security No: 111-22-3333
Date of Birth: April 6, 1989**

PRIOR EMPLOYER:

**ADONIS GYMNASIUM, INC.
2611 Atlantic Avenue
Dallas, Texas 75002**

(214) 123-1234

Employer Account No: 01-945632-4

TWC CLAIM ID AND CLAIM DATE: 07-22-2003

FORMAL NOTICE OF INTENT TO APPEAL

I, Mike Vincent Smith, on this, the fourth day of September, 2003, do hereby serve notice that I am appealing the decision of the Texas Workforce Commission in its decision to deny me unemployment benefits to which I am justly and legally entitled.

Mike Vincent Smith

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1.0 HISTORY OF MIKE SMITH'S EMPLOYMENT WITH ADG

This section of the appeal describes Adonis Gymnasium, Inc., what it is, and how it works. Also, this section describes my tenure with Adonis Gymnasium and mentions some specific incidents of my employment that are relevant to this appeal. Please note that some of the information may seem initially irrelevant and "gossipy." However, all information in this section is pertinent to my appeal as will be seen in my analysis of the accusations and reasons given for my termination which is discussed in subsequent sections of this appeal.

1.1 An Explanation of Adonis Gymnasium

Adonis Gymnasium, Inc. is a Texas corporation that is legally independent of any other businesses that share the name Adonis Gymnasium. However, in reality, the Midtown Spa of Dallas, Inc., the Adonis Gymnasium of Austin, Inc., the Adonis Gymnasium of Houston, Inc., and the Adonis Gymnasium of Milwaukee, Inc. are all corporations owned by William Xeros and his son Michael Xeros, both of whom reside in the State of Colorado. All four of these Adonis Gymnasium corporations are run as a single multi-branch business. The "Regional Manager" who oversees all four Adonis Gymsnasiums is Richard Durling who resides in the State of Texas and who also serves as the General Manager of the Adonis Gymnasium of Houston, Inc.

The Adonis Gymsnasiums are billed as health facilities for gay men with a mission to "provide a clean, safe, and fun place where our guests can meet and enjoy each other's company."¹ Innocuous and innocent as this sounds, the Adonis Gymsnasiums are homosexual bathhouses. Homosexual and bisexual men go to the Spas in order to have sex with other men.

Adonis Gymsnasiums offer the normal gym offerings of free weights, weight machines, hot tubs, and saunas. In addition, Adonis Gymsnasiums rent private rooms in which gay porn is shown and provide public "play spaces" for anonymous sexual exchanges. An example is the "Maze" which is featured in the Adonis Gymnasium and the Adonis Gymnasium of Houston. The "Maze" is truly a maze of walls and defined open spaces within a small, very dark area in which customers of the Adonis Gymsnasiums go to engage in anonymous sexual encounters.

One of the realities of the Adonis Gymsnasiums is that many supposedly heterosexual, married men are regular customers totally unbeknownst to their spouses.

¹ See Exhibit A: *Employee Orientation Manual*, pg. 1.

1.2 Initial Employment with Adonis Gymnasium

I was hired on February 22, 2003 by Adonis Gymnasium, Inc. (hereinafter referred to as "ADG"). I was hired by Christian A Franco, the general manager at that time. Upon being hired, I was given a copy of the general ADG Employee Manual to read, and I was required to fill out several agreements prior to beginning work with the company.²

Initially, I was hired to fill an open floor staff position. The floor staff position is a cleaning position. Floor staff are responsible for cleaning private rooms after customers check out of the Spa, keeping the first floor wet area clean, keeping the bathrooms, halls, and public areas on the second and third floors clean, and keeping the rooftop deck clean. I stayed in this position for approximately one month.³

The manager was impressed with my work ethic and honesty. He promoted me to a desk staff position after about a month of working in the floor staff position.⁴ The desk staff check in customers, collect payment in the form of cash or credit card, sell merchandise, check-out customers, track use and availability of rooms and lockers, launder used towels and sheets, monitor video playing, perform shift inventory, perform shift open and close paperwork, perform customer service duties, and also clean the entire first floor of the Spa (excluding the wet area) which include the gym area, all of the gym equipment, the public break area, laundry room, bathroom, foyer, and front desk area.⁵ Every desk clerk performs all of these duties on every shift.

Normally, only one person is on duty as the desk staff for a shift.⁶ When the desk staff must leave the front desk in order to perform these tasks, he is allowed to request that the manager, an assistant manager, or the backup desk staff (if one happens to be on duty during that shift) take over the cash register and run the front desk. This is not only allowed, but often required if the desk staff does not have time to complete the cleaning and laundry tasks because the shift is consistently busy.⁷

I proved very proficient at this position and was soon assigned the busiest shifts of the week because of the speed and accuracy with which I was able to perform the work.⁸

² See generally Exhibit A: *Employee Orientation Manual*.

See generally Exhibits B1 through B7: *Miscellaneous ADG Employment Agreements*.

³ Adonis Gymnasium's accusations against me involve my duties in the desk staff position. As such, I have not included a copy of the Floor Staff Manual which does not mention credit card transactions or a shift's monetary liability and responsibility. A copy of the Floor Staff Manual will be provided upon request.

⁴ See Exhibit C: *Statement of Christian A Franco*, pg. 1, ¶ 5-7.

⁵ See generally Exhibit D: *Front Desk Manual*.

⁶ ADG is open 24-hours per day, seven days per week. Each day is divided into three shifts. The first shift runs from Midnight to 8:00 am, the second shift runs from 8:00 am to 4:00 pm, and the third shift runs from 4:00 pm to midnight. During the majority of shifts, one desk clerk, one floor staff member, and either the general manager or an assistant manager is on duty. However, on Friday and Saturday nights a backup desk clerk is scheduled to assist the regular desk staff because of the high business volume on these shifts. The backup desk clerk performs all of the duties of a regular desk clerk.

⁷ See Exhibit C: *Statement of Christian A Franco*, pg. 4, ¶ 24-25.

⁸ See Exhibit C: *Statement of Christian A Franco*, pg. 2, ¶ 10.

1.3 Relevant Events Prior to Actual Termination

1.3.1 Incident with an HIV-Infected Needle

On June 22, 2003, I was the desk clerk working the third shift. As mentioned, desk clerks have many supplemental responsibilities aside from running the computer and register, including cleaning the gym and all of its equipment. I followed the usual cleaning procedure of wiping down the front of the machines, then looking behind the machine to make certain nothing had been placed there, and then proceeding to wipe down the back of the machine. As I was cleaning behind one of the pieces of gym equipment, I reached behind the machine and felt a jabbing pain in my hand. When I pulled my hand back from behind the gym machine, I found that I had been stabbed by a needle that I had not seen.⁹ I immediately informed Miguel Hernandez, the assistant manager on duty, of this incident. He was unconcerned, told me that he was sure I would be fine, and told me to wash off the needle puncture with soap, water, and peroxide, and he instructed me to dispose of the needle. I followed his instructions.¹⁰

However, Christian Franco, the general manager, showed up about an hour afterwards and was very concerned when I told him about the needle puncture. He instructed me to immediately call the Baylor Medical Center, the closest health care facility to ADG. He said that he had heard medical personnel were often given high doses of the HIV treatment drug AZT if the personnel were pricked with a needle that was possibly contaminated by HIV in order to prevent the medical personnel from becoming infected with HIV.¹¹

I called Baylor Medical Center's emergency room and spoke with a nurse. She told me that there was no such emergency procedure and told me that my only option was to get an HIV-test. I also asked if the needle could be tested for possible HIV-infection and she told me no.¹² To my horror, I learned several days later from several different sources that Christian Franco had been correct and that there was an emergency AZT protocol used for accidental HIV-infection and that the hospital could have tested the needle.

A couple of different community health organizations visit ADG weekly to provide free HIV testing. Christian Franco instructed me to get an HIV-test as soon as the testers came into ADG next. I was tested for HIV on June 27, 2003. The HIV result came back as positive for HIV antibodies.¹³

I was not HIV-positive prior to being stabbed by the needle. I had been tested for HIV less than a month before the incident with the needle and the results had been HIV-negative. My initial test results also showed a very low HIV viral load. Over the past month and a half, my viral load has

⁹ See generally Exhibit E: *Incident Report*.

¹⁰ See Exhibit E: *Incident Report*, pg. 2.

¹¹ See Exhibit C: *Statement of Christian A Franco*, pg. 3, ¶ 18-19; and Exhibit E: *Incident Report*, pg. 2.

¹² See Exhibit C: *Statement of Christian A Franco*, pg. 3, ¶ 19; and Exhibit E: *Incident Report*, pg. 2.

¹³ See Exhibit F: *HIV Test Result Analysis*.

exploded. According to my doctors, this is the normal course a new HIV infection takes. The initial viral load is low as the virus has only been recently introduced to the body. As the virus begins the infection, it multiplies vastly and one's viral load explodes. Once the initial infection stage is completed, the viral load falls until such time in the future as it takes for the virus to begin a full assault on the body (potentially many years).¹⁴

The evidence all points to that needle being the source of my becoming infected with HIV. I have all the signs of a recent infection. I had not been sexually active for a while leading up to my sero-conversion. Even when I had been sexually active in the past, I was insistent upon following safe sex practices because I wished to avoid the horrors of living with a chronic illness such as HIV. I was known for my promotion of safe sex to ADG customers and did not only pass out condoms, but also informed customers about the rising HIV and Syphilis infection rates in Dallas and their need to use protection during sex.¹⁵

1.3.2 Management Change at ADG

On or about June 24, 2003 two new customers came to ADG on my shift and purchased memberships. They had recently moved from Milwaukee, Wisconsin and were friends of Larry, manager of the Adonis Gymnasium in Milwaukee. These customers asked me if Larry had started managing ADG — Dallas yet.

Believing they were confused, I asked what they meant. Larry has worked for Midtown Spa for years as a manager and has run the Austin, Dallas, and Milwaukee locations. I assumed that they were confused about Larry managing the Dallas location because immediately before relocating to ADG - Milwaukee, Larry had been the manager of ADG — Dallas. The customers then told me that Larry was returning to manage ADG — Dallas and was to start at the end of June.

I had not heard of any management changes to ADG — Dallas so I happened to ask Christian Franco, the general manager, if something was happening and told him about what the two customers had said. He had not been informed of the upcoming change in management. Larry became the new general manager of ADG — Dallas on July 1, 2003.

Upon taking over ADG — Dallas, Larry informed Tommy Williamson, one of the assistant managers, that Larry wanted to fire me as soon as possible. According to Tommy Williamson, the reason Larry wanted to fire me before he had ever even met me is because I told the previous manager about the two customers who had come in asking for Larry. Larry said that I had "snitched" to the old manager and that he could not stand "snitches" and he wanted me gone as quickly as possible.¹⁶

¹⁴ I have chosen not to include my full medical history to show the changing viral loads for this appeal. However, all of my medical files will be provided immediately upon request.

¹⁵ See Exhibit C: *Statement of Christian A Franco*, pg. 2, ¶ 6.

¹⁶ This story was related to me by Tommy Williamson who also informed Christian A Franco of Larry's personal animosity towards me. I was unable to obtain a written statement from Tommy Williamson about this matter before submission of this Appeal, however I will continue to attempt to contact Tommy Williamson and obtain such a statement. Also, if you prefer to verify this story with him directly, you should be able to reach him at his home phone number which is (111) 11-11. See also Exhibit C: *Statement of Christian A Franco*, , pg. 8, ¶ 43-44.

1.4 Termination of Employment

On or about July 20, 2003, Larry called me into his office. He informed me that he had discovered a credit card transaction discrepancy that occurred on one of my shifts. The transaction in question had occurred approximately one month beforehand. Larry said that the owner of the credit card called ADG and claimed that a charge that had appeared on his statement was in error. The credit card holder claimed that he had never set foot in Adonis Gymnasium and his credit card had been used fraudulently.

Larry proceeded to show me the single credit card transaction receipt that had been the basis of this allegation and he showed me my time card from the week in which the transaction had occurred. The time card showed that I was working on that shift and I have no reason to doubt that this is correct.

The receipt which Larry showed me was unsigned by the cardholder. Larry accused me of having committed credit card fraud. I denied that I had done so.

When processing a credit card transaction for ADG, the desk staff is required to hand write the credit card holder's ADG member number at the top of the credit card transaction receipt. The ADG member number is usually the first seven digits of the member's official identification card (usually a state issued driver's license).

The unsigned credit card transaction receipt Larry showed me had the customer's ADG member number written at the top. However, the handwriting was not my handwriting — not even close. I pointed this out to Larry and suggested that one of the managers could have processed the transaction. It is also possible that a new employee was being trained at the desk during that shift and he could have processed that transaction.¹⁷ I also suggested that the charge was in fact valid, that the customer was lying, and that the failure to get a signature on the credit card transaction receipt was simply an innocent error on the part of the person who processed the transaction. I told Larry that I would be willing to take any handwriting analysis tests or polygraph tests that ADG desired in order to prove that I had not committed this fraud. I also requested to see the security tapes from the night and shift in question.¹⁸

¹⁷ This is only conjecture on my part and I have no proof one way or the other that someone was being trained during the shift in question. However, that handwriting on the receipt was definitely not my handwriting and I was suggesting other people who could have reasonably processed the transaction. A simple search through the employee time cards for the week these transactions occurred could identify if someone were undergoing front desk training during the shift in question.

¹⁸ ADG has four video security cameras all of which are focused on the front desk area and register at all times. The security cameras record everything that happens at the front desk 24-hours per day, 7-days per week. ADG – Dallas keeps each videotape for 30 days before recording over it with new security footage. See Exhibit C: *Statement of Christian A Franco*, pg. 5, ¶ 29.

Larry did not take me up on the offer and ADG has never requested that I submit to a handwriting analysis test or to a polygraph examination. ADG has also failed to produce the security tapes for that night and shift which could have proven guilt and innocence beyond any doubt. Larry also refused to look into the possibility that someone else had conducted the transaction in question. To my knowledge, he did not then proceed with a more thorough investigation of the matter nor has he pursued one since that time. Instead, Larry told me that I was suspended without pay for one week effective immediately.

Five days later, I called ADG and requested my schedule for the coming week. I was told that I was on the new schedule and that I would work that coming Monday. I showed up for work and was almost immediately called into Larry's office. Larry told me that I was fired. He said that the decision to fire me was not his decision but had been ordered by Michael Xeros, one of the ADG owners. Larry stated that he did not like to fire people on their first offense, but that he was required to follow the owner's instructions in the matter. He also claimed that the owner had ordered him to call the police and report me to them for credit card fraud. He said that he would be doing so the next morning.¹⁹

During this termination meeting, Larry now made the assertion that there had been two credit card charges that were fraudulent and he stated that both involved the same cardholder's credit card, and had occurred on the same night and shift. Larry did not offer a second credit card transaction receipt for me to examine nor did he allow me to examine the Credit Card Batch Report for the credit transactions that occurred on that day.

One other item of note that occurred at the meeting struck me as odd. Larry was firing me and accusing me of fraud and theft. However, he also said that he would be willing to put me on the "comp" list so I could come into the Spa for free if I would hand out promotional passes in the bars. I refused the offer.

The next day I called ADG and I spoke with Larry. I requested a written explanation and notice of my termination. He promised to provide one for me. I have never received any such written notice or explanation. I tried to contact Larry several times after that in order to find out why I had not received the written statement. I was never allowed to speak with Larry on the phone and when I went to ADG in person and asked to speak with him I was refused access.

The final part of this termination story happened when I called the Texas Workforce Commission to check the status of my unemployment benefits claim. My TWC caseworker informed me that TWC was denying my claim and refusing to pay me any unemployment benefits. I asked what formed the basis for that decision. She answered that I had violated ADG

¹⁹ I contacted both the Dallas Police Department (where ADG is located) and the Fort Worth Police Department (where the credit card holder resides). Neither police department had any record of a report made against me for anything at all and specifically did not have any report from ADG claiming that I had committed credit card fraud.

rules and regulations of which I had been made aware and that as a desk clerk for ADG, I was solely responsible for all customer transactions including the three fraudulent credit card charges. I asked her where she had heard that there were three fraudulent charges. She responded that Larry, the general manager of ADG had stated that there were three fraudulent charges all made against the same credit card, on the same shift, on the same night and the customer had agreed to pay one or two of the charges but not all three of them. ADG had never informed me of the growing number of allegations against me. Nor has ADG informed me of the fact that a person who they initially claimed had never set foot inside ADG is now agreeing to pay credit card charges from ADG.

2.0 RESPONSES TO ACCUSATIONS AGAINST MIKE SMITH

In this section I specifically identify the accusations which ADG has made against me and rebut them. In this section I will show that a simple preponderance of the evidence presented above will not only cast doubt on the accusations against me but will also expose the more likely and illegal motivations for my termination. This section will also show that it was not I who failed to follow ADG policies, procedures, rules, and regulations, but the owner and manager who failed to follow them in their zeal to terminate my employment.

2.1 Mike Smith Did Not Commit Credit Card Fraud Accidentally Nor Intentionally and the Unsigned Credit Card Transaction Receipt was Likely an Innocent Mistake Made by a Third Party

I did not commit credit card fraud intentionally nor accidentally.

The first accusation which ADG has leveled against me is that I fraudulently placed between one and three charges on a credit card on one specific day and shift. This single incident is the basis for all allegations against me and for my termination.

2.1.1 No Prior History of Theft or Fraud

I have never been accused of committing theft or fraud. I have no criminal history. I have lived in Waxahachie, Texas or Dallas, Texas for my entire life. Any check with the police departments of these cities and the police department in Fort Worth, Texas will show that I have never been a suspect for a crime, have never been accused of committing a crime, and have certainly not ever been found guilty of committing a crime.²⁰

ADG has taken an isolated incident that occurred on one shift during my employment of five months to form the basis of these allegations. If I were actually prone to theft or fraud, why are there not more suspicious transactions with which to accuse me?

²⁰ Traffic violations are the only exceptions to these statements.

2.1.2 ADG Allegations Seem to Change Daily

ADG began by accusing me of fraudulently making a single credit card charge. They showed me an unsigned credit card transaction receipt that had been processed during my shift. Yet, within one week ADG had accused me of making two fraudulent charges. However, this time no supporting evidence was provided at all. Finally, ADG allegedly reported to the TWC that there were three fraudulent charges. This time I was neither told of the additional charge nor given any proof that the alleged charge actually existed outside ADG' claims that it did.

2.1.3 ADG Failed to Pursue Claims of Innocence or Produce Evidence of the Fraud

I informed ADG that I had not processed the initial credit card transaction based on the fact that the credit card transaction receipt had the credit card holder's ADG member number written on it in someone else's handwriting. I informed ADG that I would readily submit to handwriting analysis tests and polygraph tests to prove my innocence. I asked to examine the front desk security tapes in order to prove my innocence or guilt.

ADG did not pursue nor even seem interested in the fact that there was strong evidence that someone else on the staff was performing these improper transactions. They also failed to set up any handwriting analysis tests or polygraph examinations that would have provided strong evidence of my innocence. Finally, they couldn't even be bothered to produce the front desk security videotapes that would have guaranteed the guilty party was identified. Next, ADG did not produce any proof that the credit card charges had been made other than one specific credit card transaction receipt. They either would not or could not produce the other two alleged credit card transaction receipts, but they certainly could have produced the Credit Card Batch Report from that shift which would have at least shown the existence of the charges.²¹

Finally, at the end of each shift the desk staff must perform the Close Shift Accounting. The desk clerk must total all cash and credit card sales and enter them onto a computer generated Close Shift Form. The Close Shift Form gives the total of credit card charges that were entered into the computer.²² However, the computer is not linked to the credit card machine. Thus, if someone were to ring up additional unauthorized and fraudulent credit card transactions, the total of the credit card transaction receipts would be very different than the total amount of credit card transactions recorded in the computer.²³

As explained to the employees at ADG, the only way to actually commit credit card fraud is to process a credit card transaction without entering an equivalent sale in the computer. Then the thief removes an amount of cash from the register equal to the credit card amount. Now the total

²¹ See Exhibit C: *Statement of Christian A Franco*, pgs. 6-7, ¶ 36 and If 39; and Exhibit D: *Front Desk Manual*, pg. 9, § VII(D).

²² See Exhibit D: *Front Desk Manual*, pgs. 7-9, § VII(A) - § VII(D).

²³ See Exhibit C: *Statement of Christian A Franco*, pg. 6, ¶ 38.

cash and credit card sales would equal the total amount of sales recorded by the computer and the thief would simply claim that they accidentally recorded some cash transactions as credit card transactions. If the thief entered the fraudulent credit card transaction into the computer as a sale, the computer would simply add that amount to the daily sales and the stolen money would go to the company – not the thief.²⁴

ADG has failed to produce the Close Shift Form that I had to fill out at the end of that shift. If I had committed this credit card fraud, there should be a vast difference between the computer's shift credit card sales amount and the actual amount of credit card sales. The manager is also required to compare the Credit Card Batch Close Report and a full Shift Summary Report to the numbers on each Shift Close Form. If there had been a discrepancy, it should have been apparent the very next day and ADG should be able to provide the Close Shift Form, the Shift Summary Report, and the Credit Card Batch Report for that day to validate their claims of fraud. The Shift Close Form is sent weekly to Mr. William Xeros in California and should be available. The Shift Summary Reports and the Credit Card Batch Reports are kept on-site at ADG for a minimum of six months.²⁵

If I (or anyone else for that matter) have committed the fraud of which I stand accused, why has ADG failed to provide the evidence of such fraud? It should be well documented and available. Yet, ADG has provided no actual evidence. They only produced a single unsigned credit card receipt that was not filled out in my handwriting and was probably a simple error on the part of the person who did process that credit card transaction.

2.1.4 The Allegedly Fraudulent Credit Card Transaction or Transactions Were Almost Certainly Valid

Examining the evidence leads one to the logical conclusion that these allegedly fraudulent credit card charges are almost certainly valid transactions voluntarily entered into by the legitimate credit card holder. It also seems clear that ADG is aware of the validity of the charges, the lack of any fraudulent action, and yet still used this as a basis for all allegations against me and to justify my termination.

This entire incident was caused by a person who claimed that he had never been to ADG and had his credit card used fraudulently. Then the story comes out that this person had several credit card charges at ADG on the same night and (allegedly) the same shift as the first charge. Then my TWC caseworker tells me that this supposedly defrauded person who never in his life visited ADG has suddenly agreed to pay for one or more of the supposedly fraudulent transactions. Why would an innocent man who never in his life visited ADG be willing to pay for fraudulent credit card charges? The answer is obvious. He lied. He had been a customer at ADG and he voluntarily made those charges.

²⁴ See Exhibit C: *Statement of Christian A Franco*, pg. 6, ¶ 38.

²⁵ See Exhibit C: *Statement of Christian A Franco*, pg. 7, ¶ 39.

So why would he lie? As previously established, ADG is a place where homosexual and bisexual men come to have sex with one another. That is the primary purpose of ADG. As noted previously, many ADG customers are supposedly heterosexual, married men whose spouses are blissfully unaware of their husbands' infidelitous homosexual liaisons. However, many wives discover the charges to ADG on their husbands' credit card statements. These wives then call ADG and are told that it is basically a place for homosexuals to have sex. Of course, the wives immediately and angrily confront their husbands. To try and stay out of the trouble which they deserve to be in, the husbands claim that the charges are the result of a mistake or fraud because they would NEVER go to a place like ADG (they are straight after all). Then to prove it to their wives, they are required to contact the credit card company and often ADG directly in order to disavow the charges and claim that they were made mistakenly or fraudulently. This is actually a frequent occurrence at ADG.²⁶

We can infer with almost absolute certainty that the one or two additional credit card transactions that were at first claimed to be fraudulent actually had the legitimate cardholder's correct signature and ID number written on them. He was also probably convinced by ADG to pay them and stop pretending that he was not a customer of ADG. Of course, this customer would not have been legally obligated to pay for the charge represented by the unsigned credit card transaction receipt.

The actions of ADG give strong support to this explanation. The only piece of evidence which was presented to me was the single unsigned credit card transaction receipt that had obviously been processed by someone other than myself. ADG has refused or failed to provide any other substantiating evidence though there should be more credit card transactions receipts, security tapes, a Credit Card Batch Report, the Shift Close Report, the Shift Summary Report, and possibly a comprehensive Shift Detail Report. Additionally, ADG threatens to report me to the police for fraud but fail to do so and even offer me free admission to ADG if I advertise ADG out at the bars by handing out promotional passes. These are not the actions of a business that is convinced that one of its employees was perpetrating fraud against the business or its customers.

At worst it seems certain that the failure to have the credit card transaction receipt signed was simple human error by someone who temporarily took over for me at the desk. Though in this particular instance I was not at fault, every person who has worked as a desk clerk at ADG has accidentally not gotten a credit card transaction receipt signed. This is a fairly common occurrence and has never been the sole basis for termination at ADG as I will discuss in the following section.

²⁶ See Exhibit C: *Statement of Christian A Franco*, pg. 4, ¶ 27-28.

2.2 Mike Smith Followed All ADG Policies and Procedures. However, ADG Violated Its Own Policies and Procedures When It Terminated Mike Smith Illegally and With Malicious Intent

Stemming from the ADG accusation that credit card fraud was committed on my shift, ADG has claimed to TWC that even if I had not been the actual perpetrator of the fraud, I was still absolutely responsible for all cash and credit card transactions during my shift. On this basis, ADG justified its accusations and my termination claiming that I had been informed of this absolute responsibility and that my termination was justified and standard practice at ADG. This is incorrect. This policy has never been communicated to the staff at ADG, is not a policy which ADG follows, and the only time that this supposed policy has been acted upon is in their current actions against me.

I followed all ADG rules, regulations, policies, and procedures during my employment with ADG. However, ADG failed to abide by its own policies in falsely accusing me of fraud, refusing to pursue my claims of innocence, and terminating me for a first offense that in reality was not an offense against any existing ADG rule or policy. Additionally, ADG has committed a fraud against me by falsely accusing me of performing fraudulent credit card transactions which allegations they knew to be untrue and then firing me in an attempt to protect themselves from financial liability in violation of several criminal and civil statutes in both state and federal law.

2.2.1 Unsigned Credit Card Receipts are Common at ADG and Not Generally a Basis for Termination

Every person who has worked as a desk clerk at ADG has accidentally allowed a credit card transaction receipt to go unsigned. This is not an unusual occurrence. As long as it is not a recurring problem with a particular clerk, no disciplinary action or termination results. Termination for one single such mistake is unheard of at ADG.²⁷

Even with it being a common mistake by front desk staff at ADG, there is no mention of unsigned credit card receipts or possible disciplinary consequences associated with them in any ADG materials.²⁸

ADG was not following any stated or unstated ADG policy when it terminated me for a single unsigned credit card transaction receipt.

²⁷ See Exhibit C: *Statement of Christian A Franco*, pg. 7, ¶ 41.

²⁸ See generally Exhibit A: *Employee Orientation Manual*; and Exhibit B: *Miscellaneous ADG Employment Agreements*; and Exhibit D: *Front Desk Manual*.

2.2.2 ADG Has Never Had an "Absolute Responsibility Policy" for Desk Staff

ADG does not state in any of its written materials that a desk clerk is solely and completely responsible for any and all cash or credit card transactions that occur during his shift.²⁹ Nor has ADG ever enforced such a policy though it was not specifically written down.³⁰

In fact, the only ADG document that touches even peripherally on this topic is the "Employee Shortage Policy" which all employees must sign prior to beginning work at ADG.³¹

The "Employee Shortage Policy" states the following:

I agree that all shortages caused by me at Adonis Gymnasium, Inc, will be deducted from my regular paycheck. I understand that both clerks must be present at shift change to confirm the amounts on both the register drawer and the back-up bank. I also agree to be subjected to a polygraph test at any time while employed at Adonis Gymnasium, Inc. when or if a shortage occurs or when or if my employer feels it is necessary.³²

This written policy completely rejects the policy of absolute responsibility for any ADG employee.

The first sentence states explicitly that an employee is only accountable for monetary shortages "caused by me." It does not state that an employee is ever responsible for shortages caused by someone else. It does not state that an employee is ever solely and completely responsible for all that occurs on his shift. This statement abjectly refutes the absolute responsibility policy at ADG.

The third sentence supports this as well. The third sentence makes it clear that ADG uses polygraph examinations to determine employee guilt or innocence or even to simply verify suspicions about an employee. If there is absolute responsibility, there would be no reason to go through this process of determining actual guilt or innocence. The only reason to use polygraph examinations is in order to determine actual culpability for which an employee may be disciplined or fired.

Thus, in order to discipline me or terminate my employment with ADG for a simple unsigned credit card transaction error or even outright fraud, the written ADG policy states that this error or fraud had to be caused by me and not someone else. Considering the evidence shows that I did not process the allegedly fraudulent credit card transactions even though they occurred on my shift, ADG violated its written policy by holding me accountable for this mistake or fraud.

²⁹ See generally Exhibit A: *Employee Orientation Manual*; and Exhibit B: *Miscellaneous ADG Employment Agreements*; and Exhibit D: *Front Desk Manual*.

³⁰ See Exhibit C: *Statement of Christian A. Franco*, pg. 7, ¶ 40.

³¹ See Exhibit B I: *Employee Shortage Policy*.

³² See Exhibit B I: *Employee Shortage Policy*.

2.2.3 ADG Violated Its Own Policies by Terminating Mike Smith's Employment

The first sentence of the "Employee Shortage Policy" explains the consequences of a shortage – that it "will be deducted from my regular paycheck."³³ It does not mention suspension or termination in the event of a mistake. Yet, ADG did not deduct the amount of the allegedly fraudulent credit card charges from my paycheck which it could have rightfully done if it had evidence that I had been the employee who was responsible for the error or fraud. Instead, I was suspended and then immediately terminated contrary to the express written policies of ADG.

2.2.4 ADG Violated Its Own Policies by Not Using Polygraph or Handwriting Tests to Determine Mike Smith's Guilt Prior to Termination

The "Employee Shortage Policy" expressly states that "I also agree to be subjected to a polygraph test at any time while employed at Adonis Gymnasium, Inc. when or if a shortage occurs or when or if my employer feels it is necessary."³⁴

This makes it clear that ADG will generally first attempt to determine a person's actual guilt or innocence prior to making any disciplinary or termination decisions unless absolute certainty exists about the employee's guilt.

However, I offered ADG evidence that showed that I was more than likely innocent of the accusations against me. ADG responded by making up a non-existent absolute responsibility policy. I offered repeatedly to be subjected to a handwriting analysis test or a polygraph test to prove my innocence. ADG simply ignored the requests and then violated its stated policy by suspending me and then immediately thereafter terminating my employment.

2.2.5 ADG Violated Its Own Policies When It Terminated Mike Smith for His "First Offense"

Though not a specifically written policy, it is generally the policy of ADG to suspend an employee for their first violation of ADG rules and policies.³⁵ When Larry, the manager of ADG, terminated my employment he stated that it was not his decision to fire me and that it was the owner's decision to do so. Larry stated that that he did not fire people for their "first offense." Larry has worked for the ADG clubs for several years as a manager and claimed that my termination went against the general policy. This is a specific statement against interest and proves that ADG treated me unfairly when it terminated my employment.

³³ See Exhibit B I: *Employee Shortage Policy*.

³⁴ See Exhibit B I: *Employee Shortage Policy*.

³⁵ See Exhibit C: *Statement of Christian A Franco*, pg. 8, ¶ 42.

2.2.6 ADG Has Violated the Law by Falsely Accusing Mike Smith of Fraud

By falsely accusing me of fraud and then repeating these contrived allegations to the TWC, ADG has knowingly and with malicious intent violated several laws of the State of Texas. At minimum, ADG has violated the civil tort laws of libel and slander and ADG has committed criminal fraud against me by spreading these false allegations in an attempt to stop me from collecting those Unemployment Benefits to which I am justly and legally entitled.

2.2.7 ADG Terminated Mike Smith in an Attempt to Avoid Liability for Mike Smith's Workplace Infection with HIV

The only real question remaining is why ADG took such a risk in knowingly, maliciously, and falsely accusing me of fraud and then inventing fictional company rules in order to make it look as if my termination was completely justified.

The answer is simple. ADG desired to attack my credibility and make it look as if I was attempting to cheat someone out of their money. There is no other rational explanation for the actions of ADG.

Since I contracted HIV at Adonis Gymnasium when I was stuck by the infected needle while performing my assigned cleaning duties, ADG is liable for my medical care and expenses which are related to this disease. HIV is a chronic illness which is very expensive to treat. The long-term cost of my medical treatment will likely cost millions of dollars.

However, by falsely accusing me of credit card fraud and disseminating this information to third parties (the TWC and, potentially, law enforcement agencies), ADG has begun an unfounded attack on my credibility in order to shroud me in a reputation of dishonesty, deceit, and theft. ADG will benefit from this if legal action is required for me to enforce my rights and to force ADG to accept its responsibilities.

Being able to paint me as guilty of fraud and as a thief will help ADG in a courtroom - especially in a case where my honesty and credibility are crucial. If ADG can show that there is reason to believe I have a history of fraud and theft, they can argue to a jury that I probably was not infected by HIV at work and that I staged the circumstances so as to defraud the company. If ADG is allowed to continue these lies and slanders, they might even be able to walk away financially free from responsibility and I will be left with medical bills that I cannot pay - bills that resulted from treating a chronic disease that I contracted in the course of my work for Adonis Gymnasium.

3.0 CONCLUSION

To Deny Mike Smith Benefits To Which He Is Justly And Legally Entitled Would Be Equivalent To Assisting ADG Perpetrate Its Fraud Against Him

I believe that I have shown beyond any doubt or question that I had nothing to do with the allegedly fraudulent or mistaken credit card transactions which ADG has used as a basis to spread false allegations about me and to justify terminating my employment. I further feel confident that it is obvious that ADG knew or should have known that the allegations against me were baseless and false. I have quoted from their own manuals on ADG policy and procedure showing that they lied to the Texas Workforce Commission and made up company rules and policies out of thin air in order to look like they were justified in their accusations and in terminating me.

I pray that the Texas Workforce Commission will recognize the truth of what I have presented here and speedily reverse the decision to deny me unemployment benefits to which I am justly and legally entitled. To fail to reverse this decision would make TWC complicit in what I and others believe is a soulless, disturbingly cynical, and shockingly evil conspiracy being waged against me by Adonis Gymnasium.

ACKNOWLEDGEMENT

I, Mike Vincent Smith, on this, the fourth day of September 2003, do hereby state and acknowledge that the foregoing is true and correct and based upon my own actual personal knowledge unless where otherwise specifically noted.

Mike Vincent Smith