1986

True-Flo Mechanical Systems v. Board of Review of the Industrial Commission of Utah, Department of Employment Security : Brief of Appellant

Utah Court of Appeals

David L. Wilkinson; Attorney General; Linda Wheat Field; Assistant Attorney General; The Industrial Commission of Utah Department of Employment Security; Attorneys for Respondent.
Richard K. Glauser; McKay, Burton and Thurman; Attorneys for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

TRUE-FLO MECHANICAL SYSTEMS,	:	
Appellant,	:	
v.	:	
BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY,	:	Civil No. 860281
	:	Classification 6
Respondent.	:	

APPELLANT BRIEF

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TABLE OF CONTENTS

ST

TABLE OF AUTHORITIES

ST

STATEMENT OF FACTS

On September 18, 1985, Appellant, True-Flo Mechanical Systems, Inc. (hereinafter "True-Flo"), was incorporated and commenced business (all references are to the transcript of the hearing before the Industrial Commission of Utah Employment Compensation Appeals, hereinafter "Tr."). (Tr. 16) Subsequent to the incorporation, Denny M. Hoffman and Jackie K. Hoffman (hereinafter the "Hoffmans"), as buyers, purchased from Vaughn F. Johnson and Margaret Johnson personally (hereinafter the "Johnsons"), husband and wife, as sellers, certain equipment and other assets owned by the Johnsons and previously used by Vaughn Johnson & Sons, Inc. to use in their existing business. The Hoffmans also purchased certain real property from the Johnsons personally. (Tr. 12-16) One of the buildings on this real property had previously been used by Vaughn Johnson & Sons, Inc and True-Flo leased from the Hoffmans this building, incurring and paying reasonable rent for its use. (Tr. 16) True-Flo also leased from the Hoffmans the equipment and other assets the Hoffmans purchased from the Johnsons. (Tr. 16)

After the sale by the Johnsons to the Hoffmans, Mr. Johnson continued his business, Vaughn Johnson & Sons, Inc., out of his own home (Tr. 17-18). Subsequently, Mr. Johnson attempted to rescind the sale and has stated the contract for the sale of the land and equipment was not valid, and he wanted

Mr. Hoffman off the property so his business would not be affected. (Tr. 17) Mr. Johnson attempted to have Mr. Hoffman evicted. He barred the doors and changed the locks in an attempt to keep Mr. Hoffman out. (Tr. 20) As late as December, 1985, Mr. Johnson openly stated he was still continuing his business, through his sons. (Tr. 17, 20) There have been numerous advertisements by Mr. Johnson to this effect. (Tr. 16)

Vaughn Johnson & Sons, Inc. owes arrearages to the Department of Employment Security. (Tr. 5, 6) The Board of Review of the Industrial Commission (hereinafter "Board of Review") determined that True-Flo is a successor in interest to Vaughn Johnson & Sons, Inc., and is therefore liable for the arrearage obligations of Vaughn Johnson & Sons, Inc.

STATEMENT OF ISSUES PRESENTED BY THE APPEAL

I. Whether the finding that Appellant is the successor in interest to Vaughn Johnson & Sons, Inc. is supported by the evidence.

II. Whether the finding that Vaughn Johnson & Sons, Inc. ceased operations is supported by the evidence.

III. Whether the finding that Appellant purchased all, or nearly all, of the assets of Vaughn Johnson & Sons, Inc. is supported by the evidence.

IV. Whether the legal conclusion that a leasing arrangement is sufficient to constitute "acquiring" the assets of Vaughn Johnson & Sons, Inc. is correct.

V. Whether the legal conclusion that Denny and Jackie Hoffman are personally liable for the arrearage obligations of Vaughn Johnson & Sons, Inc. is proper in light of the fact that they were not parties to the action below.

SUMMARY OF ARGUMENT

I. The Appellant is not the successor in interest to Vaughn Johnson & Sons, Inc. To be a successor, the tranferee employer must acquire all or substantially all of the transferor employer's assets and the transferor employer must discontinue operations. The unimpeached evidence at the hearing indicated that Appellant did not acquire any assets from the transferor employer, Vaughn Johnson & Sons, Inc., nor did the transferor employer discontinue operation.s

II. The conclusion of the Board of Review of the Industrial Commission that the Hoffmans are personally liable for the unpaid contributions is invalid. The Hoffmans are not parties to this litigation, therefore, the Board of Review did not have standing to make such a determination.

ARGUMENT

POINT ONE

APPELLANT IS NOT THE SUCCESSOR IN INTEREST TO VAUGHN JOHNSON AND SONS, INC.

Sections 35-4-7(c)(1)(C) and 35-4-17(f) of the Utah Code Annotated (1953, as Amended) define and outline certain obligations and responsibilities of a successor. Under Section 35-4-7, "If an employer has acquired all or substantially all the assets of another employer and the other employer had discontinued operations upon the acquisition,...the acquiring employer will be deemed a successor." Under this statute, two requirements must be met in order for succession to take place. First, the successor must acquire all or substantially all the assets of the transferor. Second, the transferor employer must discontinue operations.

A. APPELLANT DID NOT "ACQUIRE" ANY ASSETS OF THE TRANSFEROR

True-Flo has not acquired anything from the transferor employer, Vaughn Johnson & Sons, Inc. Mr. Hoffman established True-Flo prior to any of the purchases in question. This is supported by the Articles of Incorporation of Appellant, filed with the Division of Corporations on September 18, 1985. The Hoffmans purchased certain assets from the Johnsons personally. True-Flo purchased nothing from the previous employer, nor did it purchase from the Johnsons personally. True-Flo entered into

a lease agreement with the Hoffmans after the Hoffmans purchased the assets from the Johnsons.

The case law clearly points out that the word "acquire" means to become the owner of property. See, Weinberg v. Baltimore and A.R. Co., 88 A.2d 575; Wulzen v. Board of Sup'rs of City and County of San Francisco, 35 P. 353; Crutchfield v. Johnson and Latimer, 8 S.2d 412. The term "occupancy" is not a synonym for "acquired". See, Losch v. Curtis-Wright Corp., 87 N.Y.S.2d 714. Therefore, to acquire is to procure the property and ownership thereof permanently. See, State Ex Rel. Fisher v. Sherman, 21 N.E.2d 467.

The Board of Review and the administrative law judge held that True-Flo acquired the assets of Vaughn Johnson & Sons, Inc. This conclusion is contrary to the case law regarding the word "acquire". True-Flo does not own an interest in the property, but, rather, leases the property from the Hoffmans. Never at any time have any of the assets of the previous employer been purchased or acquired by True-Flo.

Additionally, the unimpeached evidence at the hearing indicates the Johnsons were the primary sellers of the equipment and not Vaughn Johnson & Sons, Inc. (Tr. 12)

B. TRANSFEROR EMPLOYER HAS NOT DISCONTINUED OPERATIONS

The evidence indicates that Mr. Johnson is still conducting a business. The Appellant incorporated and began business during the time Vaughn Johnson & Sons, Inc. was still actively engaged in business. When the Hoffmans purchased some of the assets of the Johnsons', True-Flo did not receive any of the ongoing contracts, customer lists, accounts receivable or other assets of Vaughn Johnson & Sons, Inc., but, rather, simply leased property from the Hoffmans which had come from the Johnsons personally. The unimpeached evidence introduced at the hearing indicates that after selling the assets, Mr. Johnson still conducted his business out of his home and through his sons. This fact is supported, not refuted, by the subsequent finding of the Department that a cease and desist order was issued against Mr. Johnson by the Third District Court as late as December 1985. Even though the cease and desist order was issued, Mr. Johnson continued to operate his business. Unimpeached evidence shows Mr. Johnson attempted to evict Mr. Hoffman from the property he had sold, stating that True-Flo's presence was harmful to his business. Equity should not allow the Johnsons to sell certain assets in their personal capacity, continue in their business, and transfer a large obligation to True-Flo for delinquent employment taxes from Vaughn Johnson & Sons, Inc.

In essence, the statute U.C.A. 35-4-7(c)(1)(C) requires that the acquiring employer in actuality be purchasing the business of the transferor employer. This interpretation can be drawn from the statute itself which requires the acquiring employer to purchase substantially or all of the assets and the transferor employer must discontinue its operations. In the present case, True-Flo has purchased nothing from the transferor employer, but is simply leasing some of the assets from individuals. Because Mr. Johnson has not discontinued operations, the very terms of the statute are explicit that True-Flo is not a successor. Vaughn Johnson & Sons, Inc. continues to be responsible for any obligation in arrears.

The only evidence that Appellant is a successor to Vauhn Johnson & Sons, Inc. were statements allegedly may by Mr. Johnson, who was not present at the hearing. Although hearsay evidence is admissible in an administrative hearing at the administrative law judge's discretion, it may not be the only basis for a decision, nor may it be admissible if there is no reasonable basis for inferring liability. See, Trotta v. Department of Employment Sec., 664 P.2d 1195 (Utah 1983). The administrative law judge and the Board of Review both relied on hearsay statements allegedly made by Mr. Johnson, a hostile party. True-Flo and Mr. Hoffman are presently involved in hostile litigation with Mr. Johnson. Because of these problems,

any representations made by Mr. Johnson to the Department are suspect. To rely solely on the hearsay evidence offered by a hostile party of the Appellant is grossly unfair.

POINT TWO

DENNY AND JACKIE HOFFMAN ARE NOT PARTIES TO THIS LITIGATION, THEREFORE, THE CONCLUSION OF THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION THAT THE HOFFMAN'S ARE PERSONALLY LIABLE FOR UNPAID CONTRIBUTIONS IS INVALID

This action was instigated against True-Flo as a successor to Vaughn Johnson & Sons, Inc. for unpaid contributions to the State Unemployment Compensation Fund. At no time have the Hoffmans been parties to this action. In the decision of the Board of Review, Page 2, the Board of Review held that the Hoffmans were personally liable for the unpaid contributions of Vaughn Johnson & Sons, Inc.

CONCLUSION

The evidence does not support the finding of the Board of Review that True-Flo is a successor in interest of Vaughn Johnson & Sons, Inc. Additionally, the Board of Review reached an improper legal conclusion in interpreting the word

"acquired." The decision of the Board of Review should be reversed holding that True-Flo is not a successor in interest.

DATED this ___ day of August, 1986.

McKAY, BURTON & THURMAN

By: _____
Richard K. Glauser
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify I caused to be hand delivered true and correct copies of the foregoing APPELLANT BRIEF to David L. Wilkinson, Attorney General of Utah, State Capitol Building, Salt Lake City, Utah 84114, and to Linda Wheat Field, Special Assistant Attorney General, The Industrial Commission of Utah, Department of Employment Security, 1234 South Main Street, Salt Lake City, Utah 84147, this ___ day of August, 1986.

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