

1976

# Joyce Heder v. The State of Utah; D. Frank Wilkins; Leary Howell; and John Does I through X : Brief of Respondent

Utah Supreme Court

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Wendell E. Bennett; Attorney for Respondent.

Vernon B. Romney; Attorney General; Frank V. Nelson; Assistant Attorney General; Attorneys for Appellants.

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UTAH SUPREME COURT  
BRIEF

14180R

IN THE SUPREME COURT OF THE STATE OF UTAH

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JOYCE HEDER,

:

05 MAR 1976

Plaintiff - Respondent, :

-vs-

:

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

THE STATE OF UTAH; D. FRANK  
WILKINS; LERAY HOWELL; and  
JOHN DOES I through X,

:

:

:

Case No. 14180

Defendants - Appellants. :

-----  
RESPONDENT'S BRIEF  
-----

Appeal from the District Court of Salt Lake County, State  
of Utah, the Honorable Stewart M. Hanson, Jr., presiding.  
-----

WENDELL E. BENNETT  
Suite 100, John Hancock Building  
455 South 300 East  
Salt Lake City, UT 84111  
Attorney for Respondent.

VERNON B. ROMNEY  
Attorney General  
FRANK V. NELSON  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84114  
Attorneys for Appellants

FILED

NOV 14 1975

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

JOYCE HEDER, :  
Plaintiff - Respondent, :

-vs- :

THE STATE OF UTAH; D. FRANK :  
WILKINS; LERAY HOWELL; and :  
JOHN DOES I through X, :

Case No. 14180

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WENDELL E. BENNETT  
Suite 100, John Hancock Building  
455 South 300 East  
Salt Lake City, UT 84111  
Attorney for Respondent.

VERNON B. ROMNEY  
Attorney General  
FRANK V. NELSON  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84114  
Attorneys for Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOYCE HEDER,

:

Plaintiff - Respondent, :

-vs-

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THE STATE OF UTAH; D. FRANK  
WILKINS; LERAY HOWELL; and  
JOHN DOES I through X,

:

:

:

Case No. 14180

Defendants - Appellants.:

-----  
RESPONDENT'S BRIEF  
-----

STATEMENT OF THE NATURE OF THE CASE

The respondent, as a court reporter, sues for a determination of her status as a State Merit System employee.

DISPOSITION IN THE LOWER COURT

The Honorable Stewart M. Hansen, Jr., one of the judges of the Third Judicial District Court, in and for Salt Lake County, State of Utah, ruled that, as a matter of law, the respondent, as a court reporter for many years in the Third Judicial District, was a covered Merit System employee. The Court reserved for a trial the issue of damages sustained by the respondent as a result of her dismissal.

STATEMENT OF FACTS

Respondent, for many years, has served as a court reporter in the Third Judicial District Court. At the request of the The Honorable Merrill C. Faux, the respondent acted primarily as his reporter. After the enactment of the mandatory retirement law, Judge Faux was required to take retirement on December 31, 1972. Thereafter, the respondent was discharged as a court reporter in January 1973 by The Honorable D. Frank Wilkins, District Court Judge and Court Administrator. Thereafter, the respondent attempted to have the Merit System Council consider her dismissal, and to grant her the statutory rights of a Merit System employee. The Merit System Council refused to consider her case.

The instant action was then commenced in the District Court of Salt Lake County for a determination of the Merit System status of the respondent and, after the matter was presented to The Honorable Stewart M. Hanson, Jr., he ruled that, as a matter of law, the respondent was a covered employee under the Merit System.

ARGUMENT

I.

THE DISTRICT COURT WAS CORRECT IN ITS RULING THAT COURT REPORTERS ARE MERIT SYSTEM EMPLOYEES, BASED UPON THE AMENDMENT TO THE MERIT SYSTEM ACT BY THE LEGISLATURE IN 1971.

The Legislature of the State of Utah enacted the Merit System for state employees during the 1965 term of the legislature.

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At that time, they specifically exempted certain classes of employees from coverage under the Merit System, and in particular exempted employees of the judiciary from coverage. Utah Code Annotated, 67-13-6(a)(8) states:

"(a) Except as otherwise provided by law or by rules and regulations promulgated hereunder for federally aided programs, the following positions shall be exempt from the merit provisions of this act:

(8) All members and employees of the judiciary of the State of Utah and the Attorney General of the State of Utah, and his staff and District Attorneys and their staffs."

In 1971, the Legislature amended the Merit System Act, and under the exemptions provisions, deleted what had previously been subsections (8) which exempted employees of the judiciary of the State of Utah from coverage under the Merit System, and enacted certain new sections. In particular, Title 67-13-6, Utah Code Annotated, had a subsection (g) added which states:

"All employees of the office of Secretary of State, the office of State Auditor, the office of State Treasurer, the office of Attorney General (excluding attorneys), and employees of the judiciary who are not exempt by the provisions of this section, shall be covered by the provisions of the Merit System."

(emphasis added)

As the amendment affects "employees of the judiciary", it is clear that the Legislature had the specific intent to place "employees of the judiciary" under the Merit System of the State of Utah. Prior to the 1971 amendment, "employees of the judiciary" were specifically



exempted from coverage, whereas, by the 1971 amendment, they were specifically included in the Merit System.

The appellant, in an attempt to show a continued exclusion, refers to part of another subparagraph of Title 67-13-6, Utah Code Annotated, but in doing so refers only to that part of that subsection that aids its cause. The subsection referred to, namely, Subsection (4) of Paragraph (a) of Title 67-13-6, Utah Code Annotated, deals with a specific exemption as did Subsection (8) of that title prior to the 1971 amendment. The appellant would ask the Court to believe that the Legislature spoke of employees of the judiciary in both Subparagraph (4), and then again in Subparagraph (8). Logical statutory construction would weigh heavily against that contention.

In Subparagraph (4), relied upon by the appellant, there is a specific need for affirmative action to be taken, and that is the portion of the subparagraph that the appellant failed to list in its brief. For reference the respondent sets out that subsection of Title 67-13-6 (a), Utah Code Annotated, for a full consideration as follows:

"(4) Those employees who make final policy decision, including all heads of department, agencies and major offices; those heads of subordinate units whose duties have a direct and substantial effect on the public relations of the State Administration generally; those employees whose regular duties include public advocacy in defense of administration policy; and those in a personal and confidential relationship to elected officials and to heads of departments, agencies, and other major offices. All positions so designated as being exempt shall be listed in the rules and regulations promulgated under this act by the job title and department or

agency, and any change in such exempt status, shall constitute an amendment to said rules and regulations."

The obvious reason for the appellant's omission of the last sentence of the foregoing paragraph is the fact that some affirmative action on the part of the Merit System Council was necessary to exempt people who would fit within the classification of persons designated in that subparagraph, and obviously court reporters are not on that list.

The appellant goes on to state in its brief that "clerks and reporters of the court" have such a confidential relationship with the judges for whom they work that they must be covered by Subparagraph (4). Court clerks are, however, Merit System employees under the county Merit System provided for by Title 17-13-1 et. seq., Utah Code Annotated and there are no exemptions from the county Merit System for court clerks, and court clerks are Merit System employees.

The appellant then seeks to find refuge in the provisions of Title 78-56-1.1, Utah Code Annotated, which is the part of the code dealing with court reporters and stenographers. That provision states:

"The court administrator shall appoint a certified shorthand reporter with the approval of the district judge to report the proceedings in each division of the district courts. The certified shorthand reporter shall hold office during the pleasure of the court administrator and the district judge."

The appellant relies upon that statute in an attempt to establish a confidential relationship that would place court reporters under the provisions of Title 67-13-6 (a)(4), making the court reporter

such an office that has personal and confidential relationship. However, once again, the appellant fails to read all of Subsection (4), and particularly that part that requires all such positions so designated as being exempt to be listed in the rules and regulations promulgated under the act by the job title and department or agency where the exemption is to be honored.

The appellant would then ask the court to distinguish the statutes and hold that Title 67-13-6, Utah Code Annotated, is a general statute, and that Title 78-56-1.1, Utah Code Annotated is a specific statute. What makes general general and specific specific? Is not the 1971 amendment to Title 67-13-6, Utah Code Annotated, specific? Does it not specifically enumerate a new section or group of employees that shall be covered under the Merit System of the State of Utah? Does it not specifically state that employees of the judiciary shall be covered by the provisions of the Merit System?

The appellants distinction between a general statute and a specific statute is a fictional distinction, and nothing more.

Respondent agrees with the statement of law contained on Page 8 of the appellant's brief, citing from two Utah cases, namely, in re Utah Savings and Loan Association, 21 Utah 2d 169, 442 Pacific 2d 929 (1968); and University of Utah vs. Richards, 20 Utah 457, 59 Pacific 96 (1899). The respondent further believes that the two statutes that the appellant claims are in conflict can be reconciled, and that a reasonable construction can be given to both. If, however,

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the court believes they cannot be reconciled, and that reasonable construction cannot be given to both, then the court has, on at least two prior occasions, ruled that the statute passed later in time governs and is controlling over the earlier statute.

The Utah Supreme Court in *Pacific Intermountain Express Company vs. State Tax Commission*, 7 Utah 2d. 15, 316 Pacific 2d. 549, where the court states:

\*\*\*Also supporting this view are the basic rules pertaining to statutory construction. That, in case of conflict, a later enactment is controlling over an earlier one; and that express provisions of statutes take preference over general ones."

To the same effect, see *Nelden vs. Clark*, 20 Utah 382, 59 Pacific 524; and *Bateman vs. Board of Examiners of the State of Utah*, 7 Utah 2d. 221, 322 Pacific 2d. 381.

Title 78-56-1.1, Utah Code Annotated, properly gives the court administrator and each individual district judge the right to appoint a court reporter to a district court judge to meet his satisfaction and desire. That principle does not, however, conflict with tenure of a court reporter to serve as a Merit System employee of the State of Utah. Even before the Merit System Act was amended in 1975 to include court reporters, it was apparently the court administrator's position that the provisions of Title 78-56-1.1 were to allow job security for reporters who became members of a court reporter pool, yet allowing each district judge to select from the pool the court reporter he desired. By letter on Supreme Court stationery dated

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November 13, 1969, by L.M. Cummings, as court administrator, and approved by The Honorable A.H. Ellett, assignment justice (R.15), the court administrator stated:

"Under former law, a judge hired his court reporter who served during the pleasure of the judge. This law was very unfair to a reporter who had established his home and maintained a standard of living in the community, for when his judge died, the reporter was not continued on the payroll and could not be paid by the state of Utah. The law has now been amended so that the reporters are all hired by the court administrator who consults with the judge and has the judge's permission before hiring a reporter for the particular judge. However, in case of death of the judge, the reporter still works for the state of Utah, and is entitled to his salary. He, likewise, is subject to be called by the court administrator into different courts when he is not working for his judge."

Even before the 1971 amendment to the Merit System Act in which court reporters were placed under the Merit System, and interpretation had been given to the Court Administrator Act and, particularly Section 78-56-1.1, declaring a policy of tenure for court reporters so that they would not be left out in the cold with the death of their judge. Thereafter, the Mandatory Retirement Act for judges was passed, and the retention of court reporters on payroll of the state of Utah became even more important; because their status, under prior law, could have been changed by either of two events; namely, the death of their judge or the retirement of their judge.

The two statutes in question can be reconciled, in that the Merit System Statute gives court reporters Merit System status and the Court Administrator Act gives the court administrator the

authority to control the work of the court reporters, the judge for whom they shall work (with that judge's approval), and the fixing of their vacations, and the like. They are employees of the State of Utah under the Merit System, but are subject to the control of the court administrator for the promotion of better judicial administration.

If the acts can be reconciled; then, by all means, they should be, and it is submitted that the foregoing reconciliation is a feasible one. If they cannot, however, be reconciled, then the most recently passed statute governs; and the 1971 amendment to the Merit System Act takes precedence over the 1969 enactment of the Court Administrator Act.

## II.

THE APPELLANT CANNOT TAKE REFUGE IN ITS DERELICTION OF DUTY IN FAILING TO HAVE THE RESPONDENT CERTIFIED UNDER THE SYSTEM.

The appellant asks that the District Court's judgment be reversed because it, the appellant, failed to follow the mandate of the Legislature in either discharging the respondent before she was sandwiched into the Merit System, or certifying her into the Merit System.

In dealing with that direct question at the trial court level, the following dialogue went on between Judge Hanson and the appellant's attorney on Pages 14 and 15 of the reporter's transcript of hearing as follows:

"THE COURT: Let's assume, just for the purpose of argument, that Subparagraph (g), amendment to 67-13-6, did, in fact, place court reporters under the Merit System. That would have occurred in 1971, or May of 1971. Now, the date that the particular employee falls within the class covered, goes under the Merit System, would be as of that date, would it not?

MR. NELSON: Yes. Then again, under the rules and regulations, there would have been a particular time in which they had to be certified, if, in fact, they were covered or intended to be covered.

THE COURT: All right. Now, let's assume again that court reporters were intended to be covered, but that no certification was made for any reporter at that time or any time thereafter. Now, does this mean that in spite of the intention of the Legislature, that employee can be dismissed in a manner contrary to the provisions of the Merit System.

MR. NELSON: No, your Honor. I believe that all that was done or was not done in this particular case was under the theory that they were not covered. If this court, or the highest court of this state were to say that they were covered under statute, I believe that this would have to be followed through. And again, the time element somehow would have to be prolonged, the department would still have to, I think, affirmatively take some action on it. In direct answer to your question, if it were determined that they were covered in that original act of the Legislature in 1971, I believe it would be our position that surely they would be given the opportunity to come in. But I think again, from all that has taken place, and all that has not taken place, it would indicate, at least, that there was either no intention, or someone was not interested, or at least some four years had gone by and the Legislature surely should be given the enlightenment that they have certain laws on the books; and, if they wanted to change them as the court reporters are not now under the System, they could have done something about it. I think so. I think again under construction, if we have got something that has been a condition for some period of time, not hid under a bushel of some kind, to think that the Legislature had the intention that these particular court reporters should be under it, I think would be stretching far beyond the practice showed.

THE COURT: Thank you. Anything further Mr. Bennett?

MR. BENNETT: I think, in a nutshell, what the State's position is, is that if we did not do it after the Legislature told us to do it the first time, they had a duty to come back and tell us to do it a second time; and I just don't think that is tenable."

The State, on appeal, somewhat abandons the position they took in the District Court of saying that the Legislature should have reenacted the 1971 amendment because the Merit System Council did not take the necessary action to certify court reporters into the system, and point out that there are certain certification procedures under the statute that possibly should have been followed. In that regard, they cite Title 67-13-6 (b)(2) and (3). Those particular provisions, as cited by the appellant in its brief, have reference particularly to Schedule C which states as follows:

"The non-competitive schedule, consisting of all positions for which it is not feasible to administer competitive examinations at entry. Following satisfactory completion of at least a year probationary period, employees under this schedule shall receive tenure."

Inasmuch as the Merit System Council did not take affirmative action to declare the court reporters on a competitive schedule, it can only be assumed that they were considered to be on a non-competitive schedule for which the administration of examinations was not necessary. Therefore, upon completion of one year in service after the 1971 amendment became effective in May of 1971, the court reporters would have received tenure, which would have been in May, 1972. The respon-



dent continued to hold her position until January, 1973, several months after she would have received tenure.

The State has not raised the defense, either in their pleadings or in their contentions, that the respondent was anything but a very efficient and competent court reporter. Their position is primarily that the appellant failed to follow their own procedures to certify court reporters into the Merit System and, by doing so, were able to defeat the legislative mandate. If that were the case, and if they were allowed to profit by their own inaction, then the legislative branch of government of the State of Utah might just as well be disbanded because some administrative department head has an absolute right to veto the legislative enactments of the State of Utah. That cannot be the law under our republican form of government.

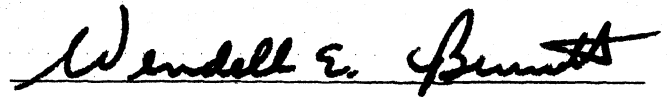
The only Merit System regulations relied upon by the appellant are those referred to on Page 14 of their brief, which are dated December 1, 1973, and which are apparently still in effect. The problem with those regulations is that they were passed many months after the respondent was discharged from her position in January of 1973. The appellant cannot claim the benefit of regulations passed long after their misdeed.

#### CONCLUSIONS

The District Court was correct in ruling that the respondent was, on January 31, 1973, a covered employee under the Merit System Act of the State of Utah, which, through its amendment in 1971, with

the changes in Section 67-13-6 (a)(8), and the changes and additions in Section 67-13-6 (g), incorporated official court reporter serving the district courts in the State of Utah and to the Merit System of the State of Utah; and that, from the effective date of that act in May, 1971, court reporters, serving in the district courts, became covered employees under said Merit System, and the District Court's ruling should be adopted by the Supreme Court.

Respectfully submitted,

A handwritten signature in cursive script, reading "Wendell E. Bennett", written over a horizontal line.

WENDELL E. BENNETT  
Attorney for Respondent  
Suite 100, John Hancock Building  
455 South 300 East  
Salt Lake City, UT 84111