1996

Eugene Harrington v. Department of Employment Security : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EUGENE HARRINGTON, Plaintiff/Appellant, vs. DEPARTMENT OF EMPLOYMENT SECURITY, Defendant/Appellee	*	APPELLANT'S REPLY BRIEF ["Oral Argument" - Priority (7)] Appellate Court No. 960710-CA (Agency File #96-BR-366 & 367)

APPELLANT'S REPLY BRIEF

Appeal From Final Decision of Board of Review
Industrial Commission, Department of Employment Security
Final Agency Action October 11, 1996

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DETAIL OF ARGUMENT

Appellant argues that reduction of his unemployment weekly benefit amount by the amount of social security benefits is contrary to congressional intent Respondent argues reduction is mandated by both state and federal statutes and that respondent has correctly applied the facts of this case and in accordance with state law

Pursuant to **Article 6 Section 2 United States Constitution Supremacy Clause** all laws of the United States made in pursuance thereof are the supreme law of the land and each individual state shall be bound thereby and anything in the state law or constitution notwithstanding The state of Utah recognizes the supreme law of the land pursuant to Article I Section 3 Utah Constitution and thus recognizes the fact that each state may make no law contrary to federal law unless specifically allowed to do so by Congress

There likewise follows that no state may enact statutory provisions whether administratively or legislatively which results in a more restrictive interpretation or result than Congress intended or federal law allows

STATUTORY INTERPRETATION

In the case before the court both sides argue that there has been an error in statutory interpretation Both sides rely upon position in federal law as follows

26 UCSC §3304(a)(15) "Approval of State Laws"

> " (a) **Requirements** The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that -
>
> (15) the amount of compensation payable to an individual for any week

which begins after March 31, 1980, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week except that-

(A) the requirements of this paragraph shall apply to any pension, retirement or retired pay, annuity, or similar periodic payment only if-

(I) such pension, retirement or retired pay, annuity, or similar payment is under a plan maintained (or contributed to) by a base period employer or chargeable employer (as determined under applicable law), and

(ii) in the case of a such a payment not made under the Social Security Act or the Railroad Retirement Act of 1974 (or the corresponding provisions of prior law), services performed for such employer by the individual after the beginning of the base period (or remuneration for such services) affect eligibility for, or increase the amount of, such pension, retirement or retired pay, annuity, or similar payment, and

(B) the state law may provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment...."

Utah state law which purports to be made in pursuance of the federal statute provides as follows:

U.C.A. 35-4-401(2)(c) "Computation of Benefits"

"...(2)(c) "...The "weekly benefit amount" of an individual who is receiving, or who is eligible to receive, based upon the individual's previous employment, **a pension**, which includes a governmental, social security, or other pension, retirement or disability retirement pay, **under a plan maintained or contributed to by a base-period employer** is the "weekly benefit amount" which is computed under this section less 100% of such retirement benefits, that are attributable to a week, disregarding any fraction of $1...." (Emphasis Added)

The state of Utah has inserted a word that is not contained in the federal law, that being "social security". The federal statutory provision on which both parties relies nowhere makes mention of the word "social security" nor does it state how such a payment is to be treated by states under the statutory scheme. In a situation where the federal law is silent on such an issue the state of Utah cannot then come in and choose a strict interpretation of the statute which was not intended by Congress at the time of its enactment.

Congress could have easily cleared up any ambiguity by making it clear that social security was included in the Act or in the alternative specifically included social security in the statute in terms of defining what is covered.

The power that Congress did give the states in 15(b) states specifically that state law may provide for limitations on the amount of any such reduction to take into account contributions made by the individual for "pension and retirement or retired pay, annuity, or other similar periodic payment"; however, the state of Utah has not specifically addressed the issue of social security and is aware that there is an ambiguity in the statutory construction and that ambiguity should not be filled in by the court but should be left to legislative action to do so.

Under the circumstances and adopting such interpretation, social security payments in this case were incorrectly assessed against appellant under what is a fraud of statutory interpretation and federal intent.

RETIREMENT BENEFITS

Utah state statutory definition of retirement is as follows:

U.A.C. R562-401-207 "Retirement or Disability Retirement Income"

> "...(2)(a) Retirement income is defined as a **pension or plan**, paid for at least in part by an employer as contrasted to a IRA, KEOGH or other savings program which provides periodic payments following discontinuance of service to an individual who qualifies for the payment because of age, length of service, disability or combination of these qualifications...." (Emphasis Added)

The state of Utah should have more appropriately defined retirement pay as compensation currently paid but previously earned by an employee and made social security benefits a disqualifying remuneration by listing it as a separate category. The various facets of the social security law prevent the benefits payable thereunder from falling into the category of retirement pay but they do fall into the category of compensation.

In **Commissioner of Labor v Renfroe, 486 SW2d 73, 56 ALR3d 547 (Ark 1972)** the court held that "retirement pay is generally considered **not** to be a pension or gratuity" and that such payments did not constitute remuneration in the form of retirement pay. The state of Utah's interpretation of the federal statute is not consistent with its intent and they should have provided for not only reduction of benefits by the amount of remuneration from certain payments in the form of retirement, but also by one-half of the "old age benefits" payable under the Social Security Act.

Appellants social security payments are based upon his wage-earner record of earnings in employment covered by the act and the program is financed by appropriation of an amount equal to the total of payroll taxes paid into the general treasury as internal revenue collections. The payments may not be subject to classification as gratuities but the concept is such that it would be difficult to say that they are "retirement payments" in the sense of our Employment Security Act.

The Employment Security program has as its purpose the providing of temporary benefits for the unemployed worker who qualifies under the Act. The Social Security program is designed primarily for persons no longer in the labor market; however, it does not mean that appellant is disqualified from drawing unemployment benefits because he is receiving old age benefits.

The statutory definition in the state of Utah defines retirement as a "pension or plan" and the state has included "social security" as part of the retirement definition which is clearly contrary to the federal statute and courts interpretation of retirement. Social Security is an "old age" benefit and was never intended to be a "retirement" and it is a noncontractual benefit under the social welfare program and appellant has no choice but to contribute.

Respondent cites to the court **Vuong v Bd of Review of Industrial Commission, 950183 (Utah App. 1995)**, unpublished Memorandum Decision filed May 1, 1995 in support of its

argument; however, appellant urges the court to disregard any reference to this case for reason that it does not apply to the current case and may not be used as authority in support of respondents position pursuant to rule as follows:

CJA Rule 4-508 "Unpublished Opinions"

> "...(1) Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel...."

NON-FAULT OVERPAYMENT

Respondent argues that the state was correct in assessing the non-fault overpayment against appellant when weekly benefit amounts were recomputed pursuant to **U.C.A. 35-4-401(c)(d)(I)(ii)**.

Appellant argues that by virtue of the state inserting the word "social security" in its adoption of the federal rule [26 USCS §3304(a)(15)] it has clearly resulted in a restrictive interpretation and result other than what Congress or federal law allows and is in violation of the United States supremacy clause.. To allow the state of Utah its interpretation of the federal statute would be to deny appellant his right to receive unemployment benefits and also redefine "retirement" to fit the states interpretation of a retirement plan. Social security is not a "retirement plan" pursuant to the states definition nor the federal courts definition of retirement therefore the state of Utah has adopted a law contrary to federal law.

Pursuant to the statutory construction it is not the courts role to fill in any ambiguity but should be left to the legislature to correct and under the circumstances of this case the non-fault overpayment assessed against appellant was incorrectly applied therefore non-fault overpayment

does not exist and appellant is entitled to receive unemployment benefits.

Appellant argues he was not given "extremely favorable terms" in the states assessment of a non-fault overpayment particularly when the state statute is in conflict with the federal statute and Congress has not made it clear in terms of defining what is covered under the Act and has been silent on the issue of whether social security is or is not included within the Act.

FUNDAMENTAL PRINCIPLES OF FAIRNESS (CONFESSION OF ERROR)

Thompson v Jackson 743 P.2d 1230 (UT App. 1987)

> "...@pg 1232...**Footnote 2** By failing to respond to our Order To Show Cause, the parties have tacitly admitted the jurisdictional defects...."

State v Loddy 618 P.2d 60 (UT 1980)

> "...@pg 61...the Tooele County Attorney has not responded in any way to this critical point. Therefore this appeal must be dismissed...." [Footnote 4. See State v Jiminez, supra., N.3 and Utah Const. Art. VII, §§1 & 18]. [State v jiminez 588 P.2d 707 (UT 1978)]

Louis v State 222 P.2d 160 (CCA Okla. 1950)

> "...@pg 163...[T]he Attorney General practically admitted the strength of the position of counsel for defendant, and has not filed a brief in answer. This is practically a confession of error...."

When one party cites legal authorities and opposing party cites no contrary authority, same may be treated as a confession of error. Respondents have failed to oppose appellants argument pursuant to Article I Section 27, of the Utah Constitution "fundamental principles of

fairness" that the agency requirement to fill out a "Retirement Income Form" and determination, pursuant to statute, that his unemployment compensation benefits would be reduced to zero based upon "retirement" received, is not what Congress had intended, nor is social security defined as retirement but social insurance. Asking claimant to disclose any social security or other retirement payments received and not base the hardship decision of unemployment compensation upon his household income is not a fundamental principle of fairness.

Respondents also failed to oppose appellants argument pursuant **to Amendment Fourteen United States Constitution** which states that one individual cannot be treated differently than another; however, that is what the agency is doing in determining eligibility of compensation. Therefore same may be treated as a confession of error.

CONCLUSION

Where there is a mixed question of state and federal law, federal law should prevail pursuant to the United States Constitution **"supremacy clause"**.

Under the states definition of "retirement" it is contrary to federal law and the state is bound to adopt laws consistent with the federal laws and cannot simply choose to enact statutory provisions whether administratively or legislatively that is contrary to federal law. The state may also **not** enact statutory provisions which results in a more restrictive interpretation for a result other than Congress intended.

Federal courts have ruled that social security is not a "retirement plan" but one of social insurance therefore appellant's unemployment weekly benefit amount which was reduced by his social security benefits which resulted in a non-fault overpayment being assessed against him

and his denial of unemployment benefits was wrongfully determined pursuant to the purpose of the Employment Security Act and also the Social Security Act.

Appellant is entitled to unemployment compensation and should not be penalized for receiving social security benefits since Congressional intent and federal courts have stated that social security is a type of social insurance not "retirement" as defined by Utah statute.

Appellant also was not at fault in the creation of a no-fault overpayment award and this award should be set aside and appellant determined not to owe the overpayment pursuant to the agency interpretation of what it defines as "retirement" since the states interpretation of the statute is not consistent with federal law.

RELIEF REQUESTED

Appellant requests the court (1) reverse the agency ruling denying unemployment compensation and assessing a no-fault overpayment award and (2) find that the state of Utah's statutory interpretation of "retirement" is not consistent with federal law and Congressional intent that there be one uniform national standard.

DATED this 21 day of March, 1997.

Eugene B. Harrington

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Appellant Pro Se

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was mailed via United States Mail, first class, postage prepaid on the 21 day of March, 1997, to the following:

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