1977

Burton Denby v. The Board of Review of The Industrial Commission of Utah : Plaintiff's Brief

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

BURTON DENBY :

Plaintiff-Appellant, :

vs. :

THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, : Case No. 14841

Defendant-Respondent.

PLAINTIFF'S BRIEF

Appeal from a decision by the Board of [illegible]
Industrial Commission of Utah

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PLAINTIFF'S BRIEF

NATURE OF THE CASE

This is an appeal from a decision by the Board of Review, Industrial Commission of Utah, denying unemployment compensation benefits to Plaintiff on the grounds that he voluntarily left his employment without good cause and subsequently was unavailable for work.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of Defendant's decision and the award of benefits from March 21, 1976, until Plaintiff is otherwise ineligible.

STATEMENT OF FACTS

Plaintiff was employed by the United States Postal Service in Salt Lake City until February 13, 1976, when he terminated his employment due to an on-the-job injury, which aggravated his arthritis and rendered him unable to perform

all of his duties. Plaintiff then returned to his home town of Fallon, Montana, to live on a family ranch. He applied for unemployment benefits in Montana and began searching for work in the area around Fallon. He was disqualified for four weeks beginning March 21, 1976, on the grounds of voluntary leaving without good cause and denied benefits indefinitely on the grounds of unavailability for work.

ARGUMENT

POINT I

DEFENDANT HAS INCORRECTLY DISQUALIFIED PLAINTIFF ON THE GROUNDS THAT HE LEFT WORK WITHOUT GOOD CAUSE, SINCE THERE IS NOT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT SUCH A CONCLUSION.

This Court's review is limited to deciding whether there is "substantial competent evidence to sustain the findings and decision of the Appeals Referee and the Board of Review." Martinez v. Board of Review, 25 U.2d 131, 477 P.2d 587,588 (1970). In the present case, a variety of deficiencies in the proceedings render Defendant's final decision unsustainable.

The applicable statute, U.C.A. §35-4-10(e), authorizes the Commission to regulate the specific procedures for hearings and states that these regulations need not conform to the rules of evidence. The specific regulation involved here, Regulation 4(b)(1), Appeals to an Appeals Referee of the Department of Employment Security Rules and Regulations (October 1, 1974), states:

> All hearings shall, after due notice to the parties, be conducted informally and in such manner as to ascertain and protect the rights of the parties. All issues relevant to the appeal shall be considered and passed upon.

The fundamental defect in the present case is that voluntary leaving under Utah Code Annotated §35-4-5(a) was not considered at the hearing. The notice of the hearing (R.0023) states the issue to be considered: "To determine if the Claimant is fully available for work and actively seeking work within the meaning of the law," referring to Utah Code Annotated §35-4-4(c). The issue was similarly framed in the Montana Appeals Referee's opening remarks. (R.0017) These statements do not constitute "due notice" and "consideration of all the issues." While several of the Referee's questions dealt with Plaintiff's employment at the Postal Service and his leaving, none focused on the crucial element of good cause for the leaving. Furthermore, all the testimony relevant to good cause is wholly favorable to Plaintiff and was not considered by Defendant.

Instead, Defendant has relied solely on a report obtained from the employer "relative to the reason for separation," (R.0012) which is not part of the record. Apparently the report states that Plaintiff's retirement was based on physical problems, and it was unclear whether Plaintiff had requested an exemption from overtime work. (R.0013) Defendant has relied only on this report to penalize Plaintiff, rather than relying on Plaintiff's own testimony, which substantiates Plaintiff's claim. This Court has repeatedly stated that "a finding cannot be based wholly upon hearsay evidence" E.g.

Hackford v. Industrial Commission, 11 U. 2d 312, 358 P.2d 899,901(1961). The report relied upon here is clearly inadmissible hearsay according to the Rules of Evidence of the Supreme Court of Utah. Therefore Defendant's decision is not supported by any competent evidence and as a matter of law must be reversed.

Moreover, the evidence establishes that Plaintiff did have good cause to leave work, and therefore he should not have been disqualified. Defendant's General Rules of Adjudication, Voluntary Leaving §210, state:

> In considering the reasonableness of a worker's leaving work, it may be necessary to measure his actions by what a reasonable worker might do under similar circumstances.

Defendant has properly promulgated these rules and is bound by them. Morton v. Ruiz, 415 U.S. 199 (1974). Applying this "reasonable worker" standard, Plaintiff's leaving was for good cause. He testified that the job had "extreme tensions and pressures, people passout, heart attacks, nervous breakdwons ...." (R.0019) He further testified:

> Q: Did the arthritis affect you on the job?
>
> A: Oh, very uncomfortable - painful when I was on these pills, my employers didn't know it but these pills affected my ability in some ways.... Take those pills heavily it's kind of dulling to your mind.... (R.0020)

In a statement to a Montana Department representative, Plaintiff asserted:

> The job was becoming increasingly difficult for me both psychologically and physically due to mandatory overtime work. I was unable to continue under the circumstances. (R.0013)

In his appeal statement Plaintiff affirmed:

> Many of the Postel Service die from heart attacks and nervous breakdowns, before reaching retirement age, due to pressure and tension. I wished to avoid this and continue living. (R. 0013)

Given these circumstances, including Plaintiff's advanced age of 64, his choice to leave was based on good cause and is clearly reasonable upon consideration of the record as a whole.

Finally, Defendant's conclusions of lack of good cause for leaving dealt with the lack of medical evidence to substantiate Plaintiff's medical problems and the mandatory overtime work as partial basis for leaving. Again, Defendant has failed to follow its own rules, by which it is bound, specifically General Rules of Adjudication, Voluntary Leaving §235.25, Illness or Injury:

> Reasonableness should be the rule in assisting the claimant to provide his proof. In all cases he should be assisted with a detailed written description of the nature of his defect, its effect on his work or of the work on his health and his ability to continue working. In addition, a physician's statement should be suggested as further proof.

In the instant case, the record does not reflect that any such assistance was ever rendered. In fact Plaintiff on his own asserted that Dr. Lamb, an orthopedic specialist, and the Personnel Section of the Salt Lake Post Office could provide further documentation of his medical problems, yet Defendant, having made no effort whatsoever to assist Plaintiff in providing proof of his medical problems, then attempted to bolster its position by this situation.

As to the overtime issue, Defendant draws a totally unwarranted inference from the hearsay employer information. The person submitting the report indicated a lack of information as to whether Plaintiff even qualified for an exemption from overtime. (R.0013) Plaintiff stated in his appeal letter that to the best of his knowledge overtime was mandatory. He further stated that he was not aware of any possible exceptions to the mandatory overtime and that this was the subject of union-management negotiations at the time. (R.0033) From this evidence, Defendant somehow concludes that Plaintiff did not have good cause for leaving work. Yet there is no substantial competent evidence to support such a conclusion, and it should be reversed.

POINT II

DEFENDANT HAS INCORRECTLY DENIED PLAINTIFF BENEFITS ON THE GROUNDS THAT HE HAS BEEN UNAVAILABLE FOR WORK, SINCE THERE IS NOT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT SUCH A CONCLUSION.

The standard to be applied in determining availability for work was set forth by this Court in Gocke v. Wiesley, 18 U.2d 245,249,420 P.2d.44,46 (1966):

> It is our duty to examine the record and to affirm the decision unless we can say as a matter of law that the conclusion on the question of "available for work" was wrong because only the opposite conclusions could be drawn from the facts.

The Court then stated, "The claimant must act in good faith and make an active and reasonable effort to secure employment." More recently this Court has stated that the test is "reasonableness under the circumstances." Lauder v. Board of Review of Industrial Comm., 29 U.2d 121,506 P.2d 50,51 (1973).

In Gocke, the Court reversed the Board and held the claimant entitled to benefits based on the reasonableness of her search for work. In that case, the claimant personally applied to her previous employer and to one other employer, called several other employers, and answered some newspaper advertisements. These contacts were held reasonable under the circumstances in a large metropolitan area, Salt Lake City. In the instant case, Plaintiff has been continuously registered with the Job Service office in Miles City, Montana, 48 miles west of his home in Fallon; personally contacted a construction company in Glendive, Montana, 26 miles east of Fallon; personally contacted two bars in Fallon and Terry, Montana, 11 miles west of Fallon; and personally contacted a farm chemical company in Fallon. Plaintiff has applied for as a clerical worker, bartender, salesman, and commercial gardener. (R.0011,0021-23) Despite this detailed testimony, Defendant concludes, "Claimant will travel as far as Terry, Montana, population of 1,400...." (R.0014) This is a clearly erroneous conclusion not supported by any evidence.

Rather, Plaintiff, aware that he has moved to a small town, has liberally defined the area in which he will work: from 50 miles west of his residence to 26 miles east, encompassing four towns with a combined population of over 20,000, and has stated his willingness to accept any suitable work given his physical problems, even work in which he has no background. (R.0014) Surely this effort cannot be characterized as "passive and unreasonable." Plaintiff has undertaken a reasonable search for employment under his circumstances in rural Montana just as did Mrs. Gocke in her

search in Salt Lake City. And like Mrs. Gocke, he should be awarded benefits, since the record clearly establishes that as a matter of law, the claimant was available for work, having met the "reasonableness" test outlined above.

CONCLUSION

As there is neither substantial evidence to support disqualification of Plaintiff on the grounds of voluntary leaving without good cause nor to support denial of benefits to Plaintiff on the grounds of unavailability for work, these decisions should be reversed. Judgment should be entered that as a matter of law Plaintiff is entitled to unemployment compensation benefits from March 21, 1976, until he is otherwise ineligible.

Respectfully submitted this 21st day of January, 1977.

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By Lucy Billings
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed copies of the foregoing Plaintiff's Brief to Floyd G. Astin, Special Assistant Attorney General, Industrial Commission of Utah, Department of Employment Security, 174 Social Hall Avenue, Salt Lake City, Utah 84147, this 25 day of January, 1977.

Jean Milner