1977

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BURTON DENBY

Plaintiff-Appellant,

vs.

Case No. 14841

THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

DEFENDANT'S BRIEF

Appeal from a decision of the Department of Employment Security, State of Utah, as upheld by the Appeals Referee and the Board of Review of the Industrial Commission, State of Utah

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STATEMENT OF CASE

On May 21, 1976, a representative of the Department of Employment Security issued a decision finding appellant ineligible to receive unemployment compensation on the grounds appellant left work voluntarily without good cause. The representative assessed a disqualification of four weeks beginning March 21, 1976, and ending April 17, 1976.

On May 31, 1976, a Department representative issued a decision finding the appellant ineligible for unemployment compensation on the grounds the appellant was not available for work, and assessing a disqualification beginning March 21, 1976, and ending when appellant meets the requirements for eligibility.

Appellant appealed both decisions to an Appeals Referee. After due notice and hearing which was conducted by a Montana Appeals Referee as agent for the Utah Department, and

Appeals Referee affirmed both decisions of the Department representative. On September 1, 1976, the Board of Review affirmed the decision of the Appeals Referee. The matter is now before this Court on a petition for review of the decision of the Board of Review, which was dated October 27, 1976.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the decision of the Board of Review that appellant was not eligible for compensation during the period in question with instructions to the Department to pay appellant the usual and regular unemployment compensation for such period.

STATEMENT OF FACTS

Appellant's statement of facts is correct except in the following respects:

1. The record does not show as stated on page one of appellant's brief that appellant terminated his employment due to an on-the-job injury. (R.0019, R.0020)

2. The appeallant's search for work during the period from February 22, 1976, (R.0017) to June 2, 1976, the date of hearing, consisted of contacting approximately five persons. (R.0021) Appellant's work search was also limited to employment that would not earn in excess of the amount allowed before reduction of Social Security benefits. (R.0021)

ARGUMENT

POINT I

THAT IN REVIEWING DETERMINATION OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE COMMISSION FINDINGS IF SUCH ARE SUSTAINED BY SUBSTANTIAL COMPETENT EVIDENCE.

Respondent is in agreement with appellant's statement that this Court's review of determinations of the Department is limited to deciding whether there is substantial competent evidence to sustain such determinations. *Martinez v. Board of Review*, 25 U. 2d

131, 477 P. 2d 587 (1970). A reversal of an order of the Department denying compensation can only be justified if there is no substantial evidence to sustain the determination and the facts giving rise to a right to compensation are so persuasive that the Department's denial was clearly capricious, arbitrary, and unreasonable. *Kennecott Copper Corporation Employees v. Department of Employment Security,* 13 U. 2d 262, 372 P. 2d 987 (1962); *Gocke v. Wiesley,* 18 U. 2d 245, 420 P. 2d 44, 45 (1966). in *Members of Iron Workers Union of Provo v. Industrial Commission* 104, Utah 242, 248; 139 P. 2d 208,211, this Court Said:

> If there is substantial competent evidence to sustain the findings and decision of the Industrial Commission, this court may not set aside the decision even though on a review of the record we might well have reached a different result.

POINT II

THAT THE EMPLOYMENT SECURITY ACT IS TO BE LIBERALLY CONSTRUED TO ACCOMPLISH ITS OBJECTS BUT SUCH RULE DOES NOT PERMIT AN EXTENTION OF UNEMPLOYMENT COMPENSATION TO ONE WHOSE INITIAL OR CONTINUED UNEMPLOYMENT MAY BE VOLITIONAL.

Section 35-4-5(a) provides:

5. An individual shall be ineligible for benefits or for purposes of establishing a waiting period:

(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one or more than the five next following weeks, as determined by the commission according to the circumstances in each case, provided that when such individual has had no bona fide employment between the week in which he voluntarily left such work without good cause and the week in which he filed for benefits he shall be so disqualified for the week in which he filed for benefits and for not less than one or more than the five next following weeks.

It is a generally acknowledged rule that Employment Security Acts are construed liberally to accomplish their purposes and objectives. However, in Utah and elsewhere the courts construe the Acts in a manner which distinguishes those petitioning as beneficiaries of the Act who become unemployed for reasons attributable to themselves or whose failure to become reemployed may be attributable to their own actions or failure to act. This Court has previously pointed out that the purpose of the Employment Security Act is to assist the

worker and his family in times when he is out of work *without fault on his part. Kennecott Copper Corporation Employees v. Department of Employment Security,* supra. The Court has also noted that the underlying legislative intent of the various disqualifying provisions of the Act is that the Department is to determine a claimant's eligibility for unemployment compensation by adhering to the volitional test, and declared the policy of the contributions provisions of the statute to be to establish financial reserves for the benefit of persons unemployed through no fault of their own. *Olaf Nelson Construction Company v. Industrial Commission,* 121 Utah 521, 243 P. 2d 951 (1952).

POINT III

THE DEPARTMENT AND THE BOARD OF REVIEW DID NOT ERR IN DETERMINING THAT APPELLANT'S SEPARATION FROM EMPLOYMENT WAS VOLITIONAL.

Consonant with the volitional test is the rule that one who retires of his own volition and without compulsion by company rules, policies or contracts, leaves work voluntarily and without good cause. *76 Am. Jur. 2d,* Unemployment Compensation, Section 60.

Counsel for appellant contends the notice of hearing (R.0027) was defective in that it did not set forth voluntary leaving as an issue. It is readily conceded by respondent that the Rules and Regulations of the Department require notice and an opportunity to be heard in such manner as to protect the rights of the parties, as cited in appellant's brief. Put another way,

> The right to a hearing, where it exists, particularly under the Constitution, is a right, no more and no less, to a hearing which is adequate to safeguard the rights for which such protection is afforded. *2 Am. Jur. 2d,* Administrative Law, Section 410.

In the case of *Goff v. Administrator of Division of Employment Security,* 157 So 2d 268 (1968), it was held that one claiming unemployment compensation had ample notice of the potentially disqualifying issue and was not misled or deprived of an opportunity to prepare for the hearing. The court based its determination on the totality of the administrative proceedings, which the court found "clearly apprised him" of the charge against him.

> To render a hearing unfair, the defect or the practice complained of must be such as might lead to a denial of justice, or there must be an absence of one of the elements deemed essential to due process of law. *2 Am. Jur. 2d,* Administrative Law, Section 410.

A review of the totality of the administrative proceedings in the instant case clearly shows that appellant was aware of the purpose of the hearing and that he had adequate opportunity to prepare.

The decision of the Department Representative issued May 21, 1976, (R.0032) set forth not only the conclusion that appellant left work voluntarily without good cause, but also gave the findings in support of that conclusion. The appellant then filed with the Department a letter of appeal (R.0029) in which he reiterated his reasons for leaving his employment.

When the appellant attended the hearing and was asked about his employment with the Post Office and subsequent termination (R.0018) he offered no objection and gave no indication that he felt less than adequately prepared to discuss the matter.

Finally, it is noted that nowhere in his appeal to the Board of Review did appellant raise the question of inadequate notice, and it is mentioned for the first time only in appellant's brief to this Court. It is a well-settled principle of law that appellate review will be limited to matters raised at the lower level. *5 Am. Jur. 2d,* Appeal and Error, Section 545; See Footnote 11, wherein is cited the case of *State v. Woolman,* 84 Utah 23, 33 P. 2d 640, 93 ALR 723 (1934), as illustrative of the position of this Court. That there may be exceptions to the general rule is only proper where its application would result in a clear miscarriage of justice. *5 Am. Jur. 2d,* Appeal and Error, Section 726.

That appellant had ample opportunity to present his case with respect to his termination is obvious from the hearing transcript. The pertinent portions of the appellant's testimony are contained in the following excerpts from the transcript:

Q. What happened on February 15, 1976, to cause your termination?

A: Well, I felt like this. Seventy years of age is the compulsory retirement age in the postal service. Very, very many don't reach 70 years of age — it's a job of extreme tensions and pressures, people pass out, heart attacks, nervous breakdowns, I just didn't feel like staying any longer. (R.0019)

Q: Were you having any physical problems

A: Oh, I have physical problems all the time. (R.0019)

Appellant then proceeded to explain that his physical problems consisted of arthritis for which he took medication that on occasions was dulling to the mind, and that "the bosses didn't know it . . ." (R.0020)

On two separate occasions in the hearing, the appellant admitted that his retirement was voluntary (R.0019 and R.0020). Nowhere in the hearing transcript or in any other part of the record is there any reference to an on-the-job injury which aggravated the appellant's arthritic condition and rendered him unable to perform his duties, as alluded to in appellant's brief.

Although an injury may, in appropriate circumstances, constitute good cause for leaving work, the record is totally devoid of even a suggestion that appellant's termination was due to such an event. To the contrary, appellant stated, in his "Notice of Appeal" to the Appeals Referee (R.0033) that, "Many of the Postal 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." That the appellant decided to no longer work under the stress and tension associated with his employment is further evidenced by his statement to the Appeals Referee that, "I'm a pretty rugged character but this mental stress sometimes gets to be too much." (R.0021)

Contrary to the assertion in appellant's brief (page 3), the Referee's decision was not based *solely* on a report obtained from the employer concerning the appellant's separation. The Referee's decision was based on a number of factors, including the lack of medical evidence to show that the appellant's physical condition prevented him from continuing employment (R.0013); the appellant's statement to the effect that, "The job was becoming increasingly difficult for me both psychologically and physically due to the mandatory overtime." (R.0013 and R.0019); and the appellant's failure to request exemption from the overtime (R.0013). All of the foregoing are amply supported by the appellant's testimony at the hearing, as quoted and referred to in the preceding paragraphs.

Counsel for appellant argues that appellant meets the "reasonable worker" standard

set forth in the respondent's *General Rules of Adjudication,* Voluntary Leaving, Section 210. *General Rules of Adjudication,* Voluntary Leaving, Section 235.25, also cited in appeallant's brief, states:

> Alternatives to leaving work may also exist. Depending on the seriousness of the illness, ordinary prudence might dictate medical or surgical treatments without leaving work. For example, eye strain can be corrected by glasses without quitting. Other considerations are whether the worker gave his job a fair trial while ill or injured, *whether he requested transfer to other work,* and suitability of the work, considering the worker's health and safety and prospects of securing other work within his capabilities. (Emphasis added).

The Board of Review and the Appeals Referee rightly concluded that the appellant did not pursue availabile alternatives before terminating. This conclusion is supported by the appellant's testimony that although the pills he took for arthritis could affect his ability, " . . . The bosses didn't know it, but I knew it." (R.0020)

POINT IV

IN DETERMINING AVAILABILITY OF ONE WHO HAS VOLUNTARILY RETIRED, THE COMMISSION MAY ASSERT A REBUTTABLE PRESUMPTION OF WITHDRAWAL FROM THE LABOR FORCE.

General Rules of Adjudication, Able and Available, Section 235.1 provides:

> In making a decision concerning *available for work,* the record of investigation should consider the individual's mental attitude toward becoming employed as compared to his mental attitude toward retirement. (Presumably, the two attitudes oppose each other when considering eligibility for unemployment benefits.) An individual's attitude toward becoming employed is demonstrated by the reason for his current unemployment, his incentives or lack of incentives to work, the conditions the labor market requires before it ordinarily accepts an individual into employment, and the individual's own efforts to become employed.
>
> Availability considerations should also be viewed in the light that an individual has, by his voluntary retirement, created a strong presumption of nonavailability. This presumption, however, may be overcome by circumstances indicating otherwise.

Unemployment compensation is provided under a program insuring against wage loss the individual who is willing, able, and ready to accept suitable work or employment which he does not have good cause to refuse. He must be unequivocally exposed to the labor market.

In the case of *Fleiszig v. Board of Review of Division of Unemployment Compensation of Department of Labor,* 412 Ill. 49, 104 N.E. 2d 818, the Cout said:

> Moreover, the application for and receipt of retirement benefits and old age assistance clearly evidence an intention to retire from gainful labor, and disclose a mental attitude inconsistent with a genuine attachment to the labor market.

In accord with this decision are *Bennett v. Review Board of Indiana Employment Security Division,* 122 Ind. App. 37, 102 N.E. 2d 383; and *Weisberg v. Catherwood,* 28 App. Div. 2d 1050, 283 N.Y. 2d 712. In *Weisberg,* a government employee who quit a temporary job to avoid exceeding income limits of Social Security benefits, was held to be not entitled to unemployment compensation.

Of course, the presumption of withdrawal from the labor force may be rebutted by evidence of an active and reasonable effort to secure employment.

POINT V

THE DEPARTMENT AND THE BOARD OF REVIEW DID NOT ERR IN DETERMINING THAT APPELLANT WAS "NOT AVAILABLE FOR WORK" WITHIN THE MEANING OF SECTION 35-4-4 U.C.A.

Section 35-4-4 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the commission that:
>
> (c) He is able to work and is available for work.

Counsel for appellant refers the Court to its decision in *Gocke v. Wiesley,* supra, as setting the standard to be applied in determining availability for work. The Court stated therein:

> . . . It seems that the claimant must act in good faith and make an active and reasonable effort to secure employment . . . It is our belief that the broad purpose of the unemployment statute requires one to make a reasonable attempt to obtain employment.

It is appellant's contention on appeal that the liberally defined geographical area of his work search and his willingness to accept any suitable employment evidence a reasonable search for work. Respondent takes no quarrel with the stated extent of the work search area

or appellant's willingness to accept work as a bartender, for which he has no experience.

Despite appellant's willingness to accept employment within a broadly defined geographical area, he contacted only five persons in his search for work during the period of time commencing with his move to Fallon, Montana, on February 22, 1976, and ending on June 2, 1976, the date of hearing. (R.0021) Appellant made no other contacts during that period of time. (R.0023)

Furthermore, appellant restricts his availability for work to a maximum earning level of $2,700-$2,800 so as not to effect a reduction in his Social Security benefits. (R.0021)

The limited efforts exerted by the appellant over the extended period of time involved in this case are insufficient to overcome a presumption of withdrawal from the labor force. Even were such a presumption not to exist, the appellant's efforts, together with his earnings restriction, evidence no more than a passive willingness to accept work.

CONCLUSION

The decision of the Board of Review and the Appeals Referee should be affirmed and benefits denied accordingly.

RESPECTFULLY SUBMITTED,

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