

1985

James Green v. Board of Review of the Industrial Commission of Utah, Department of Employment Security, and Utah Transit Authority : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES GREEN,)	
)	
Plaintiff,)	
)	PLAINTIFF'S REPLY BRIEF
vs.)	
)	Supreme Court No. 20861
BOARD OF REVIEW OF THE)	
INDUSTRIAL COMMISSION OF)	
UTAH, DEPARTMENT OF)	
EMPLOYMENT SECURITY, and UTAH)	
TRANSIT AUTHORITY,)	
)	
Defendants.)	

Petition for Review of a Decision of the Board of
Review of the Industrial Commission of Utah,
Unemployment Insurance Division
State of Utah

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**I.
ARGUMENT**

**A.
THE RECORD DOES NOT REASONABLY SUPPORT THE
CONCLUSION THAT MR. GREEN, IN EFFECT,
ABANDONED HIS JOB**

Beginning at page 17 of its brief, respondent Board of Review (sometimes hereinafter referred to as the Board) argues that the UTA's request that plaintiff James Green sign an "accident commitment" was a reasonable request which would have at least allowed him to preserve his employment while he looked for another job. Therefore, the Board's argument goes, Mr. Green in effect abandoned his job despite the clear, uncontroverted evidence that he was told, "You're fired". (R.63) and then received a letter stating "effective immediately your employment . . . is terminated". (R.76)

Characterization of the request as "reasonable" is dependant on a finding that Mr. Green was asked to sign a commitment not to have further preventable accidents for twelve months. As argued in Plaintiff's Opening Brief, there is no evidence in the record to support a conclusion that Mr. Green was asked to sign a commitment not to be involved in a preventable accident. Instead, the testimony offered at the administrative hearing was only to the effect that he was asked to commit to "not have any more accidents." (R.51)

The difference is critical. By being asked to commit to "not have any more accidents", any control Mr. Green otherwise had over his own job security was eliminated. Had Mr. Green signed a commitment worded in the manner described by the UTA's

representative at the administrative hearing, he would have been subject to immediate termination had he been involved in any accident, whether one caused by an act of God or one resulting solely from another driver's negligence, such as would likely be the case were Mr. Green's bus rearended by another vehicle. Such a tenuous hold on his employment was understandably unacceptable to Mr. Green.

At page 22 of its brief, the Board argues that the record as a whole supports the finding that Mr. Green was requested only to commit to having no preventable accidents. On the contrary, the most that can be said from review of the whole record is that it was apparently the UTA's subjective intent that Mr. Green commit to no preventable accidents. Every objective manifestation to Mr. Green was that his only option to termination was to commit to not be involved in any more accidents. (R.51; 62; 63; 67; 69)

The Board argues that the UTA's policy was to discipline drivers only for preventable accidents and thus the commitment Mr. Green was asked to make must have been with reference to preventable accidents. In so arguing, the Board forgets that when asked to commit in writing to no more accidents, Mr. Green had already been involved in enough preventable accidents to sustain a decision by the UTA to terminate him. At that point in time the UTA was free to impose any condition to his continued employment it wished, no matter how onerous. Assume that after being involved in three preventable accidents the UTA offered Mr. Green the opportunity

to keep his employment but only if he were to agree to drive a bus at a wage rate of \$1 per day. If Mr. Green were to reject that option and was then fired (and ignoring any minimum wage law implications) is there any doubt that the Court would reject an argument that he should have accepted the offer in order to preserve his employment while looking for other employment? This writer thinks not. Thus, the question reverts to the reasonableness of the request that Mr. Green commit to not be involved in any more accidents in order to keep his job.

Other factors advanced by the Board in support of its argument that the record as a whole shows that Mr. Green was only asked to commit to noninvolvement in preventable accidents are also without merit. The Board points out that in his appeal from the Administrative Law Judge's decision, Mr. Green stated, "It is against my moral value to sign a document stating that I will not have another preventable accident", and argues that the statement exhibits an awareness that Mr. Green was only asked to commit to having no more preventable accidents. Obviously, that statement in his appeal came after he had read the Administrative Law Judge's findings. The statement is irrelevant to a determination of Mr. Green's state of mind when asked to make a commitment.

The introduction into evidence at the administrative hearing of a written commitment to avoid preventable accidents signed by another driver is also irrelevant to Mr. Green's understanding of the condition sought to be imposed. Mr. Green testified that he never saw a commitment reduced to writing

(R.58) and the UTA's representative admitted that a commitment for Mr. Green's signature was not reduced to writing. (R.57)

Finally, the Board argues at page 24 of its brief, that had Mr. Green signed a commitment then had another accident, an investigation of the accident would have been submitted to the Accident Review Committee and no action taken against him if it were determined to have been unpreventable. The argument is completely speculative with no basis in the record.

In sum, the record clearly reveals that Mr. Green was terminated. It is respectfully submitted that the condition which the UTA sought to impose on Mr. Green was not the arguably reasonable request that he avoid further preventable accidents. Instead, as testified to by Ms. McCall (R.51), Mr. Green was asked to make an unreasonable commitment that he "not have any more accidents", thus leaving his prospects for continued employment at the peril of every other driver on the road. If Mr. Green is to be denied benefits, the denial must be based on a finding that he was terminated for "just cause" as that term is used in Utah Code Ann. §35-4-5(b)(1).

B.

THE RECORD DOES NOT SUPPORT A FINDING THAT MR. GREEN'S
DRIVING RECORD PROVIDED "JUST CAUSE" FOR
HIS TERMINATION

In Point IV of its brief, the Board appears to acknowledge that Continental Oil Co. v. Bd. of Review of Indus. Comm., Utah, 568 P.2d 727 (1977), would be controlling absent subsequent statutory amendments. In Continental Oil this court held that, under the facts there presented, an employee

terminated from his employment solely on the basis of his driving record could not be denied benefits on the ground that the termination was for misconduct. The Board aptly points out that Continental Oil was decided prior to the 1983 addition of the phrase "for just cause" in Utah Code Ann. §35-4-5(b)(1). The Board does acknowledge that "just cause" for discharging an employee requires that there be "some fault on the part of the employee involved". Department of Employment Security Rules and Regulations, Proposed Rule A71-07-1:5(II)-1.A.2. The Board, however, makes the unwarranted assumption that the UTA's determination that Mr. Green's accidents were "preventable" necessarily means that Mr. Green was at fault, as the word "fault" is used in the Department's Proposed Rules.

There is no evidence in the record that before the UTA determines an accident to be "preventable" it must find that the involved driver was "negligent" as that term is applied in tort law.¹ To the contrary, when a UTA bus operator is involved in an accident the UTA Accident Review Committee makes "a determination of whether the accident was due to operator error or whether it was just something that the operator could have done nothing to avoid". (R.48)(emphasis added) Or, as found by the Administrative Law Judge, the committee "makes a determination as to whether the accident was preventable by the driver, or

1. Negligence is, of course, the failure to do what a reasonable and prudent person would have done under the circumstances. West Union Canal Co. v. Provo Bench Canal & Irrigation Co., 116 Utah 128, 208 P.2d 1119 (1949).

completely beyond the driver's control". (R.40)(emphasis added)

Thus, it appears that "preventable" as used by the UTA when evaluating bus accidents, is lower on a scale of relative culpability than is "negligence". On the other hand, "fault", as determined with reference to the Proposed Rules, is higher on a culpability scale than "negligence". Proposed Rule A71-07-1:5(II)-1.A.5. states,

"5. Fault may not be established when the reason for discharge is based on such things as mere mistakes, inefficiency, failure of performance as the result of inability or incapacity, inadvertence in isolated instances, good-faith errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence, etc. These examples are not disqualifying because of the lack of knowledge or control. . . ." (emphasis added)

Thus, in determining fault the Proposed Rules adopt standards very similar to those set forth in Continental Oil Co., supra, and Martin v. Department of Employment Security, Utah, 682 P.2d 304 (1984).

Without evidence as to the particulars of Mr. Green's accidents, the Board's evaluation (Respondents' Brief, pages 26-29) of culpability, knowledge and control, the three elements of "fault" as that term is used in the Proposed Rules, is of little or no help. All that can be determined from the record is that Mr. Green's accidents were "preventable", i.e., not completely beyond the driver's control. (R.40)

After Mr. Green was initially granted unemployment benefits (R.40), it was the employer's burden at the administrative hearing to establish "just cause". Proposed Rule A71-07-1:5(II)-1.B.1., quoted at page 7 of Respondents' Brief.

Given the facts that were placed into the record in this case, a finding of "fault" and thus "just cause" for Mr. Green's termination can only be reached if the Proposed Rule quoted above is completely ignored.

It should also be noted that the above-quoted Proposed Rule contemplates that plural instances of inadvertance or good-faith errors in judgment will not necessarily be disqualifying. The Board's characterization (Respondents' Brief, page 27) of Mr. Green's driving record as involving "repeated incidents of preventable accidents" is harsh, even if technically correct. Mr. Green was involved in a "minor" accident on January 14, 1984. 360 days later, on January 8, 1985, he was involved in two more "minor" accidents.

When driving his route, Mr. Green was faced with competing interests similar to those of the employee in Martin v. Department of Employment Security, supra, 682 P.2d 304, discussed in Respondents' Brief at pages 30-31. Here, Mr. Green was disciplined for being involved in preventable accidents which he testified occurred on icy roads. Mr. Green could also have been disciplined for not meeting his bus route schedule, absent valid reason for delay.² Given such competing job performance obligations, it is not surprising that occasional "preventable" accidents occur during winter weather.

2. Admittedly, the UTA Policies and Procedure Manual for Coach Operators, on which plaintiff bases his assertion, is not a part of the record.

Finally, the Board attempts to distinguish the Continental Oil Co. case by pointing out that the employee in that case, after being involved in the accident which precipitated his termination, was acquitted of a charge of driving under the influence of alcohol. On the other hand, there was a determination in the instant case that Mr. Green's accidents were preventable. The different burden of proof in the Continental Oil Co. employee's criminal case renders the distinction null.

C.


MR. GREEN'S FAILURE TO FILE A UNION GRIEVANCE
IS IRRELEVANT TO THE ISSUES HEREIN

At various places in its brief, the Board of Review points out that Mr. Green failed to grieve his termination through his union. His failure to contest the termination is irrelevant. The issue in this case is not whether Mr. Green was discharged in violation of his union's contract, or whether he might have a civil cause of action for wrongful discharge. Instead, the issue is whether he was discharged for reasons that disqualify him from unemployment benefits. The Board presents no authority for the proposition that Mr. Green was required to exhaust his remedies for continued employment through a union grievance before he could qualify for unemployment benefits. Indeed, no such authority can be found.

**II.
CONCLUSION**

Plaintiff James Green respectfully submits that this Court should enter its order reversing the decision of the Board of Review and remand the matter to the Industrial Commission with directions to enter an order declaring plaintiff eligible for unemployment benefits and reinstating benefits in accordance with Utah Code Ann. §35-4-3.


Dated this 17th day of ~~November~~^{December}, 1985.



Steven H. Lybbert
Attorney for Plaintiff
James Green

CERTIFICATE OF SERVICE

I certify that on the 19th day of December, 1985, I hand delivered four (4) copies of the foregoing Reply Brief to Lorin R. Blauer, Special Assistant Attorney general, 1234 South Main Street, Salt Lake City, Utah.



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